MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 16, 2012, through September 13, 2012

JOHN O. JUROSZEK
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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019

Justices

MICHAEL F. CAVANAGH	2015
MARILYN KELLY	2013
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2013

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
DANIEL C. BRUBAKER, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

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JÜRGEN O. SKOPPEK	SAMUEL R. SMITH
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CHAD C. SCHMUCKER

Clerk: CORBIN R. DAVIS
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Crier: DAVID G. PALAZZOLO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013
MARK T. BOONSTRA	2013
MICHAEL J. RIORDAN	2013

Chief Clerk/Research Director:
LARRY S. ROYSTER

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
3.	DEBORAH ROSS ADAMS	2019
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2019
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	GERSHWIN ALLEN DRAIN	2017
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	AMY PATRICIA HATHAWAY	2019
	CYNTHIA GRAY HATHAWAY	2017

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2017
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	TIMOTHY MICHAEL KENNY	2017
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	WADE H. McCREE	2015
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LINDA V. PARKER	2019
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	JEANNE STEMPIEN	2017
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2015
	DEBORAH A. THOMAS	2019
	MARGARET MARY VanHOUTEN	2015
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2017
	RICHARD N. LaFLAMME	2017
	JOHN G. McBAIN, Jr.	2015
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2017
	RAE LEE CHABOT	2017
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015

		Term Expires January 1 of
	SHALINA D. KUMAR	2015
	DENISE LANGFORD-MORRIS	2019
	CHERYL A. MATTHEWS	2017
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2017
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2017
	WILLIAM C. MARIETTI	2017
	JOHN C. RUCK	2015
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2015
	JOHN C. FOSTER	2015

		Term Expires January 1 of
	PETER J. MACERONI	2015
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	DAVID VIVIANO	2019
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENEFELD	2017
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	JAMES ROBERT REDFORD	2017
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2015
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	KENT D. ENGLE	2017
	JON H. HULSING	2015
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	TIMOTHY P. CONNORS	2019
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015

		Term Expires January 1 of
	LAURA BAIRD	2019
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2017
	JANELLE A. LAWLESS	2015
	PAULA J.M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	DANIEL J. KELLY	2015
	CYNTHIA A. LANE	2017
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2017
35.	GERALD D. LOSTRACCO	2015
36.	KATHLEEN BRICKLEY	2019
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2017
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	JOSEPH A. COSTELLO, Jr.	2015
	MICHAEL W. LaBEAU	2019
	MICHAEL A. WEIPERT	2017
	DANIEL WHITE	2015
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2019
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2017
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015

		Term Expires January 1 of
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2017
54.	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2019
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2019

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2019
	JACK VITALE	2017
2A.	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2017
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2017
8-1.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019
	CAROL A. HUSUM	2017
8-2.	ROBERT C. KROPF	2015
8-3.	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2019
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2017
	DANIEL GOOSTREY	2013
	JAMES M. JUSTIN	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017
14B.	CHARLES POPE	2015

		Term Expires January 1 of
15.	JULIE CREAL	2013
	CHRISTOPHER S. EASTHOPE	2015
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2017
	MARK W. SOMERS	2015
	RICHARD WYGONIK	2013
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2015
22.	SYLVIA A. JAMES	2013[1]
	SABRINA JOHNSON	2013[2]
23.	GENO SALOMONE	2019
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2017
25.	DAVID A. BAJOREK	2015
	DAVID J. ZELENAK	2017
26.	MICHAEL F. CIUNGAN	2015
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER	2017
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	MARYLIN E. ATKINS	2013
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2017

[1] To September 5, 2012.

[2] From September 6, 2012.

		Term Expires January 1 of
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2017
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2015
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2015
	PAULA G. HUMPHRIES	2017
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2019
	DEMETRIA BRUE	2015[3]
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2015
	MICHAEL E. WAGNER	2015
37.	JOHN M. CHMURA	2019
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2017
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2015
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2015
	KEITH P. HUNT	2019

[3] From September 6, 2012.

		Term Expires January 1 of
	JOSEPH LONGO	2017
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2017
47.	JAMES BRADY	2015
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2015
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2015
52-1.	ROBERT BONDY	2019
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2017
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	KIRSTEN NIELSEN HARTIG	2017
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2015
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015
54B.	RICHARD D. BALL	2017
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013

		Term Expires January 1 of
	BRADLEY S. KNOLL	2015
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2017
	JEANINE NEMESI LaVILLE	2019
	BEN H. LOGAN, II	2019
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	MARK W. LATCHANA	2017
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2017
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015

		Term Expires January 1 of
74.	MARK E. JANER	2015
	TIMOTHY J. KELLY	2013
	DAWN A. KILDA	2015
75.	STEVEN CARRAS	2017
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015
85.	BRENT V. DANIELSON	2015
86.	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
	MICHAEL STEPKA	2017
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2017
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2012
CARL F. JARBOE	2014
THEODORE A. METRY	2011
MATTHEW R. RUMORA	2014

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2019
Branch	FREDERICK L. WOOD	2013
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	LOWELL R. ULRICH	2013[1]
Clare/Gladwin	THOMAS P. McLAUGHLIN	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013

[1] To August 31, 2012.

Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Ingham	R. GEORGE ECONOMY	2019
Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT SYKES, JR.	2019
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	CURTIS J. BELL, JR.	2019
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	NANARUTH H. CARPENTER	2017
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2015
Kent	GEORGE JAY QUIST	2017
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2019
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	JOHN A. HOHMAN, JR.	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2015
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
Oceana	BRADLEY G. LAMBRIX	2019

Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019
Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	DOUGLAS C. DOSSON	2019
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2019
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN TOMLINSON	2019
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Sanilac	GREGORY S. ROSS	2015
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2019
Washtenaw	NANCY CORNELIA WHEELER	2015
Washtenaw	DARLENE A. O'BRIEN	2019
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2015
Wayne	MILTON L. MACK, JR.	2017
Wayne	MARTIN T. MAHER	2015
Wayne	LISA MARIE NEILSON	2017[2]
Wayne	FRANK S. SZYMANSKI	2019
Wexford	KENNETH L. TACOMA	2019

[2] From September 10, 2012.

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Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing.	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant.	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
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Leelanau	Leland	13
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Luce	Newberry	11
Mackinac	St. Ignace	50
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Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
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AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted August 24, 2012, effective immediately (File No. 2011-28)—REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information:

(1)-(6) [Unchanged.]

(7) if applicable, the notice required by MCL 257.732~~(7)~~(8), and the juvenile's Michigan driver's license number; and

(8) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(G) [Unchanged.]

(H) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is

in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

(1)-(2) [Unchanged.]

(3) Order. The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made, if the court finds

(a) on the basis of clear and convincing evidence admitted pursuant to subrule ~~(G)(2)~~(H)(2) that one or more facts alleged in the petition:

(i) are true, and

(ii) come within MCL 712A.19b(3).

(4) [Unchanged.]

(I)-(K) [Unchanged.]

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A)-(G) [Unchanged.]

(H) Appeal; Bond.

(1) An appeal following a formal hearing is a matter of right. Except as otherwise provided in this rule, the appeal is governed by subchapter 7.100.

(a) [Unchanged.]

(b) If a defendant who has posted a bond fails to comply with the requirements of MCR ~~7.101(C)(2) or (F) (1)~~7.104(D), the appeal may be considered abandoned, and the district court may dismiss the appeal on 14~~7~~ days' notice to the parties pursuant to MCR

~~7.101(G)~~7.113. The court clerk must promptly notify the circuit court of a dismissal and the circuit court shall dismiss the claim of appeal. If the appeal is dismissed or the judgment is affirmed, the district court may apply the bond to the fine and costs.

(c) [Unchanged.]

(2)-(3) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(M) [Unchanged.]

(N) Appeals From Possessory Judgments.

(1) Rules Applicable. Except as provided by this rule, appeals must comply with MCR 7.101~~, 7.102, and 7.103~~ through 7.115.

(2)-(4) [Unchanged.]

(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(K) [Unchanged.]

(L) Appeal. Except as provided by this rule or by law, the rules applicable to other appeals to circuit court (see MCR 7.101-~~7.103~~7.115) apply to appeals from judgments in land contract forfeiture cases. However, in such cases the time limit for filing a claim of appeal under MCR ~~7.101(B)(1)~~ 7.104(A) is 10 days.

RULE 4.401. MAGISTRATES.

(A)-(C) [Unchanged.]

(D) Appeals. Appeals of right may be taken from a decision of the magistrate to the district court in the district in which the magistrate serves by filing a written claim of appeal in substantially the form pro-

vided by MCR ~~7.101(C)~~7.104 within 7 days of the entry of the decision of the magistrate. No fee is required on the filing of the appeal, except as otherwise provided by statute or court rule. The action is heard de novo by the district court.

RULE 5.101. FORM AND COMMENCEMENT OF ACTION.

(A)-(B) [Unchanged.]

(C) Civil Actions, Commencement, Governing Rules. The following actions~~,~~ must be titled civil actions~~,~~ and commenced by filing a complaint and are governed by the rules ~~which are~~ applicable to civil actions in circuit court:

(1) Any action against another filed by a fiduciary or trustee.~~, and~~

(2) Any action filed by a claimant after notice that the claim has been disallowed.

RULE 6.610. CRIMINAL PROCEDURES GENERALLY.

(A)-(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1)-(7) [Unchanged.]

(8) The following provisions apply where a defendant seeks to challenge the plea.

(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to

appeal under MCR ~~7.103(B)(6)~~7.105(F)(2).

(b)-(c) [Unchanged.]

(9) [Unchanged.]

(F)-(H) [Unchanged.]

RULE 6.625. APPEAL; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the court must enter an order appointing a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR ~~7.101(B)(1)~~7.104(A)(3) and MCR ~~7.103(B)(1)~~ 7.105(A)(3) shall commence on the day of the appointment.

RULE 6.907. ARRAIGNMENT ON COMPLAINT AND WARRANT.

(A) [Unchanged.]

(B) Temporary Detention Pending Arraignment. If the prosecuting attorney has authorized the filing of a complaint and warrant charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, a juvenile may, following apprehension, be detained pending arraignment:

(1)-(3) [Unchanged.]

(C) [Unchanged.]

RULE 7.104. FILING APPEAL OF RIGHT.

(A)-(D) [Unchanged.]

(E) Service Requirements in Trial Court or Agency. Within the time for taking the appeal, the appellant shall serve on the trial court or agency from which the appeal is taken:

(1)-(4) [Unchanged.]

(5) unless there is nothing to be transcribed, the certificate of the court reporter or recorder or a statement that the transcript has been ordered and payment for it made or secured. If a statement is filed, the certificate of the court reporter or recorder must be filed within 7 days after a transcript is ordered by a party ~~of~~ or the court.

(F) [Unchanged.]

RULE 7.105. APPLICATION FOR LEAVE TO APPEAL.

(A) [Unchanged.]

(1)-(2) [Unchanged.]

(3) If a criminal defendant, who has pled guilty or nolo contendere, requests appointment of an attorney within 21 days after entry of the judgment ~~or~~of sentence, an application must be filed within 21 days after entry of an order:

(a) appointing or denying the appointment of an attorney, or

(b) denying a timely filed motion described in subrule (2).

(B)-(E) [Unchanged.]

(F) Late Appeal.

(1) [Unchanged.]

(2) A late application may not be filed more than 6 months after entry of:

(a)-(b) [Unchanged.]

(c) an order denying a motion for new trial under MCR 6.610~~(H)~~(G) or a motion to withdraw a plea under MCR 6.610(E)~~(7)~~(8).

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A)-(C) [Unchanged.]

(D) Civil Infractions. An appeal bond and stay in a civil infraction proceeding is governed by MCR 4.101~~(G)~~(H)(1).

(E) [Unchanged.]

RULE 7.116. APPEALS UNDER THE MICHIGAN EMPLOYMENT SECURITY ACT.

(A)[Unchanged.]

(B) Time Requirements. An appeal of right from an order or decision of the ~~Michigan Employment Security Board of Review~~ Michigan Compensation Appellate Commission must be taken within 30 days after the mailing of the ~~board's~~ commission's decision.

(C) Manner of Filing. Except as provided in subrule (B), the claim of appeal shall conform with MCR 7.104 and must include statements of jurisdiction and venue. In addition, proof that the claim of appeal was served on the ~~board of review~~ Michigan Compensation Appellate Commission and all interested parties must be filed in the circuit court. The ~~Michigan Employment Security Commission~~ unemployment agency is a party to any appeal under MCL 421.38(3), but the ~~board of review~~ Michigan Compensation Appellate Commission is not a party to the appeal.

(D)-(E) [Unchanged.]

(F) Record on Appeal. Within 42 days after the claim of appeal is served on the ~~board of review~~

Michigan Compensation Appellate Commission, or within further time as the circuit court allows, the ~~board of review~~ Michigan Compensation Appellate Commission must transmit to the clerk of the circuit court a certified copy of the record of proceedings before the ~~referee~~ administrative law judge and the ~~board of review~~ Michigan Compensation Appellate Commission. ~~The certified record must comply with MCL 421.36(3).~~ The ~~board of review~~ Michigan Compensation Appellate Commission must notify the parties that the record was transmitted.

(G) Standard of Review and Decision on Appeal. Under MCL 421.38, the circuit court may reverse an order or decision of the ~~board of review~~ Michigan Compensation Appellate Commission only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. In all other respects, MCR ~~7.115~~7.114 applies.

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A)-(C) [Unchanged.]

(D) Application for Leave to Appeal.

(1)-(3) [Unchanged.]

(4) *Venue.* An application for leave to appeal a decision of the parole board may only be filed in the circuit court of the sentencing county under MCL 791.234~~(9)~~(11).

(E)-(G) [Unchanged.]

(H) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(D)(4) applies along with the following:

(1)-(3) [Unchanged.]

(4) *Remand to the Parole Board.* On motion by a party or on the court's own motion, the court may remand the matter to the parole board for an explanation of its decision.

(a) [Unchanged.]

(b) The time for filing briefs on appeal under subrule ~~(G)~~(H)(2) is tolled while the matter is pending on remand.

(I)-(J) [Unchanged.]

RULE 7.119. APPEALS FROM AGENCIES GOVERNED BY THE ADMINISTRATIVE PROCEDURES ACT.

(A) [Unchanged.]

(B) Appeal of Right.

(1) [Unchanged.]

(2) *Manner of Filing*.

(a)-(e) [Unchanged.]

(f) Service. In addition to the service requirements found in MCR 7.104(D)~~(7)~~(9), the appellant must also serve the Attorney General.

(3) [Unchanged.]

(C) [Unchanged.]

(D) Late Appeal. The appellant may file an application for late appeal if permitted by statute.

(1) [Unchanged.]

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must include:

(a)-(b) [Unchanged.]

(c) ~~include~~ statements of jurisdiction and venue complying with subrules (C)(2)~~(b)~~(a) and ~~(c)~~(b).

(3)-(4) [Unchanged.]

(E)-(H) [Unchanged.]

RULE 7.121. APPEALS FROM CONCEALED WEAPON LICENSING BOARDS.

(A)-(C) [Unchanged.]

(D) Procedure in All Other Appeals.

(1) *Briefs*. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(2) *Oral Argument*. If requested in accord with MCR 7.111(C), the court shall hold oral argument within 14 days after the appellee's brief was filed or due. The court may dispense with oral argument under MCR ~~7.115~~7.114(A).

(3) [Unchanged.]

(E)-(F) [Unchanged.]

RULE 7.123. APPEALS FROM AGENCIES NOT GOVERNED BY ANOTHER RULE.

(A)-(B) [Unchanged.]

(C) Application for Leave to Appeal or for Interlocutory Appeal.

(1) [Unchanged.]

(2) *Manner of Filing*. An application must comply with MCR 7.105 and MCR ~~7.112~~7.123(B)(2)(b)(ii). An application for interlocutory appeal shall also state why review of the agency's final decision will not be an adequate remedy.

(3)-(4) [Unchanged.]

(D) Late Appeal. The appellant may file an application for late appeal if permitted by statute.

(1) [Unchanged.]

(2) *Manner of Filing*. In addition to the requirements of MCR 7.105(B), the application must include:

(a)-(b) [Unchanged.]

(c) statements of jurisdiction and venue complying with MCR ~~7.120~~7.123(B)(2)(b)(ii).

(3)-(4) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A)-(E) [Unchanged.]

(F) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules,

(a) the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court;

(b) execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210~~[H]~~[H] or by the Supreme Court clerk under MCR 7.311[B]) with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

(2) [Unchanged.]

(G)-(J) [Unchanged.]

RULE 7.309. PREPARATION, FILING, AND SERVING BRIEFS AND APPENDIXES.

(A) [Unchanged.]

(1)-(2) [Unchanged.]

(3) A brief and appendix must have a suitable cover of heavy paper. The cover page must follow this form:

In the Supreme Court
Appeal from the [court or tribunal appealed from]
[judge or presiding officer]

Plaintiff-[Appellant or Appellee],

Docket No. _____

v

Defendant-[Appellee or Appellant].

Brief on Appeal — [Appellant or Appellee]

ORAL ARGUMENT [NOT] REQUESTED

_____
Attorney for [Plaintiff or Defendant]-[Appellant or Appellee]

[Business Address]

_____
_____
_____

Appendixes shall be similarly endorsed, but shall be designated as appendixes instead of briefs. The cover of the brief of the appellant must be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray; that of an appendix, yellow.

(B)-(C) [Unchanged.]

RULE 7.317. OPINIONS, ORDERS, AND JUDGMENTS OF SUPREME COURT.

(A)-(B) [Unchanged.]

(C) Orders or Judgments Pursuant to Opinions.

(1) Entry. The clerk shall enter an order or judgment pursuant to an opinion as of the date the opinion is filed with the clerk.

(2) Routine Issuance.

(a) If a motion for rehearing is not timely filed under MCR 7.313~~(D)(1)~~ (E)(1), the clerk shall send a certified copy of the order or judgment to the Court of Appeals with its file, and to the court or tribunal which tried the case with its record, not less than 21 days nor more than 28 days after entry of the order or judgment.

(b) [Unchanged.]

(3)-(4) [Unchanged.]

(D) [Unchanged.]

Staff Comment: These amendments reflect changes to correct minor technical errors that have occurred in drafting or to respond to recent adopted rule revisions, which occasionally inadvertently create incorrect cross-references in other rules.

The staff comment is not an authoritative construction by the Court.

AMENDMENTS OF LOCAL COURT RULES

THIRD JUDICIAL CIRCUIT

Approved August 24, 2012, effective immediately (File No. 2011-28)—REPORTER.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A) Service of Pleadings. Except for cases subject to e-filing, at ~~At~~ the time of service of the summons and complaint, the plaintiff shall serve upon the opposing parties the preprinted caption labels provided pursuant to LCR 2.113(C).

RULE 2.113. FORM OF PLEADINGS AND OTHER PAPERS.

(C) Pleadings—Requirement of Preprinted Labels. Except for cases subject to e-filing, all~~All~~ pleadings hereinafter filed shall bear on the face thereof preprinted caption labels to be furnished by the Office of the County Clerk.

Staff Comment: The changes in LCR 2.107 and LCR 2.113 are intended to clarify that the requirement to distribute and use preprinted caption labels does not apply to cases that are e-filed.

The staff comment is not an authoritative construction by the Court.

TWENTY-SEVENTH JUDICIAL DISTRICT AND FIFTY-FIFTH JUDICIAL DISTRICT

Approved August 24, 2012, effective immediately (File No. 2011-28)—REPORTER.

On order of the Court, Rule 4.201 of the Local Court Rules of the 27th District Court (Riverview) is rescinded, effective immediately.

On further order of the Court, Rule 4.201 of the Local Court Rules of the 55th District Court (Mason) is also rescinded, effective immediately.

SUPREME COURT CASES

VELEZ v TUMA

Docket No. 138952. Argued December 5, 2011 (Calendar No. 5). Decided July 23, 2012.

Myriam Velez brought a medical malpractice action in the Wayne Circuit Court against Detroit Receiving Hospital, Harper Hospital, Lawrence Schwartz, M.D., and Martin Tuma, M.D., alleging that their failure to timely operate on her leg necessitated its amputation below the knee. After she filed a notice of intent to sue, the hospitals entered into a settlement agreement with Velez in which they agreed to pay her $195,000, and Velez's lawsuit was dismissed by stipulation but without prejudice to Tuma, who was not a party to the settlement agreement. Velez filed a new complaint against Tuma, and he was found to be professionally negligent by the jury, which returned a verdict of $1,524,831 in Velez's favor. The jury itemized the verdict, separating it into past and future economic and noneconomic damages. Tuma requested that the court apply the noneconomic-damages cap of MCL 600.1483 to the jury verdict and then subtract the $195,000 settlement from the final judgment. The court, Cynthia Diane Stephens, J., denied the request, citing *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245 (2003), which held that the common-law setoff applied to medical malpractice actions in which joint and several liability is imposed. The court instead subtracted the settlement from the unadjusted verdict, applied the collateral-source rule of MCL 600.6303, which requires the court to reduce a jury's award of economic damages by the amount already paid to the plaintiff by collateral sources such as insurers, and then applied the noneconomic-damages cap. The Court of Appeals, CAVANAGH, P.J., and FORT HOOD and DAVIS, JJ., affirmed the circuit court's decision to apply the setoff to the unadjusted verdict, reasoning that the common-law setoff rule was applicable to medical malpractice cases involving jointly and severally liable tortfeasors and that application of the setoff rule was necessary to prevent plaintiffs from being overcompensated. In addition, the Court of Appeals reasoned that there was no reason why the same principles that applied to the right to setoff under former MCL 600.2925d(b) should not also apply to the common-law right to setoff. 283 Mich App 396 (2009). Tuma applied for leave to appeal in the Supreme

Court, and plaintiff filed an application for leave to cross-appeal, both which were initially denied. 488 Mich 903 (2010). The Supreme Court subsequently granted Tuma's motion for reconsideration and granted him leave to appeal limited to the question whether the setoff amount was properly set off against the jury verdict before application of the noneconomic-damages cap and calculation of the final judgment. 489 Mich 956 (2011). Following oral argument, the Supreme Court sua sponte reconsidered Velez's cross-application and granted her leave to cross-appeal to consider whether *Markley* had been correctly decided. 491 Mich 873.

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices MARKMAN (except for one statement in part III) and ZAHRA, the Supreme Court *held*:

To the extent that the Legislature has not abolished principles of joint and several liability, those principles and the common-law setoff rule remain the law in Michigan. When joint and several liability principles apply in a medical malpractice case, any settlement must be set off from the final judgment after application of the noneconomic-damages cap and the collateral-source rule.

1. The common law remains in effect until changed, amended, or repealed. It is a question of legislative intent whether the Legislature has abrogated, amended, or preempted the common law. The Legislature did not intend to abolish the common-law setoff rule in the context of joint and several liability medical malpractice cases because its elimination of the statutory setoff, former MCL 600.2925d(b), by 1995 PA 161 did not demonstrate a clear intent to abrogate the common-law rule. Deletion of the statutory setoff was only a part of comprehensive tort-reform legislation, and there is no conflict between the common-law rule and the current versions of the statutes that would prevent the common-law setoff from being applied in these joint and several liability situations.

2. Under MCL 600.6304(6)(a), the defendants in a medical malpractice action are jointly and severally liable for the entire judgment as long as the plaintiff is determined to have been without fault. "Joint and several liability" means that when multiple tortfeasors cause a single, indivisible injury, the injured party may either sue all tortfeasors jointly or any individual tortfeasor severally, and each individual tortfeasor is liable for the entire judgment. Inherent in the term "joint and several liability" is the concept that a plaintiff's recovery is limited to one compensation for the single injury. Because a jointly and severally liable tortfeasor may settle before trial, the common-law setoff rule ensures that the plaintiff does not recover more than a single

recovery for the single injury. The common-law setoff rule enables the remaining tortfeasors, who are still liable for the entire injury, to set off the amount of the cotortfeasors' settlement from any verdict rendered against them. Because the Legislature reiterated that liability in most medical malpractice cases is joint and several, it retained the common-law setoff rule. The Legislature eliminated the statutory setoff rule of former MCL 600.2925d(b) to acknowledge that a setoff does not apply in actions that involve several liability only, not to abrogate the common-law setoff rule.

3. *Markley* was correctly decided. Moreover, the common-law setoff rule remains applicable in any situation in which the Legislature has specifically retained the technical common-law term "joint and several liability."

4. Under MCL 600.1483(1), the total amount of noneconomic damages recoverable by a medical malpractice plaintiff may not exceed the statutory cap on those damages, $394,200 in this case. The word "recoverable" denotes noneconomic losses that are capable of being recovered and necessarily includes recovery through settlements, jury verdicts, or arbitration. Accordingly, a plaintiff's actual loss—and thus full compensation—for noneconomic losses caused by the single injury may be less than what a jury awards and may not in total exceed the statutory limit.

5. When principles of joint and several liability apply in a medical malpractice case and a codefendant has settled a plaintiff's claim before trial, the circuit court must apply the noneconomic-damages cap to the jury's verdict first, as well as any other statutorily required adjustments, before reducing the award by the amount of the codefendant's settlement. This order of operations ensures that a plaintiff does not recover more than a single recovery for his or her actual loss, which is consistent with the purpose of the common-law setoff rule and the cap on noneconomic damages. The Court of Appeals erred by upholding the circuit court's decision to apply the setoff against the jury's verdict. Rather, the circuit court should have first applied both the collateral-source rule and the noneconomic-damages cap to arrive at the final judgment, which would constitute Velez's full compensation for her injury as determined by the Legislature, and then applied the common-law setoff. As a result, Velez was entitled to recover only $199,200 from Tuma.

Reversed and remanded; leave to appeal with respect to Tuma's remaining issue denied.

Justice MARKMAN concurred with the majority with the exception of its statement that the Supreme Court will not extend a statute by implication to abrogate established rules of common

law. The Legislature does not have to explicitly state that it is abrogating a common-law right in order for it to abrogate a common-law right.

Justice CAVANAGH, joined by Justice MARILYN KELLY, concurring in part and dissenting in part, agreed with the majority and dissenting opinions that the common-law setoff rule applies to joint and several liability medical malpractices cases, but would have affirmed the Court of Appeals' judgment with respect to how the common-law setoff rule should be applied because the panel did not clearly err by holding that the common-law setoff rule should be applied to the unadjusted jury verdict, as it traditionally had been. Further, Justice CAVANAGH agreed with the dissent that applying the rule to the unadjusted jury verdict before the noneconomic-damages cap ensures that the plaintiff is not overcompensated for a single, indivisible injury. Applying the rule in this matter would not impair the protections afforded to a defendant by the cap.

Justice HATHAWAY, dissenting, agreed with the majority that the common-law setoff rule applies when a plaintiff in a medical malpractice action is not comparatively negligent, but would have upheld the lower courts' judgments with respect to how the common-law setoff rule should be applied to arrive at the final amount of damages recovered by the plaintiff. In the absence of statutory authority, the common-law setoff rule must be applied in the same manner and for the same purpose as it was at the common law, which was to preclude a plaintiff from being overcompensated for a single, indivisible injury. MCL 600.1483(1) and MCL 600.6304 make it clear that the limitation on noneconomic damages should be applied only to damages awarded by a trier of fact, not settlements. Accordingly, settlement amounts should be subtracted from the full amount of damages awarded by the trier of fact to ensure that the plaintiff is fully compensated, but not overcompensated. Moreover, the majority's analysis ignores the terms of the settling parties' agreement.

DAMAGES — MEDICAL MALPRACTICE — JOINT AND SEVERAL LIABILITY — SETOFFS — COMMON-LAW SETOFF RULE.

Under MCL 600.6304(6)(a), the defendants in a medical malpractice action are jointly and severally liable for the entire judgment as long as the plaintiff is comparatively without fault; under joint and several liability, when multiple tortfeasors cause a single, indivisible injury, the injured party may either sue all tortfeasors jointly or he or she may sue any individual tortfeasor severally, and each individual tortfeasor is liable for the entire judgment; if a jointly and severally liable tortfeasor settles before trial, the common-law

setoff rule provides that the remaining tortfeasors may set off the amount of the settlement from any verdict rendered against them; the Legislature did not abolish the common-law setoff rule in the context of joint and several liability medical malpractice cases when it repealed the statutory setoff, former MCL 600.2925d(b), by 1995 PA 161, but the settlement must be set off from the final judgment after application of any statutorily required adjustments, including the noneconomic-damages cap of MCL 600.1483(1) and the collateral-source rule of MCL 600.6303.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *The Thurswell Law Firm* (by *Judith A. Susskind*), for Myriam Velez.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank* and *Geoffrey M. Brown*) for Martin Tuma, M.D.

Amici Curiae:

Kerr, Russell & Weber PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*) for the Michigan State Medical Society and the American Medical Association.

MARY BETH KELLY, J. In this joint and several liability medical malpractice case, defendant, Dr. Martin Tuma, seeks a reduction of the final judgment rendered against him by the amount of his codefendants' settlement. This case therefore concerns the interplay between the common-law setoff rule, whereby a jointly and severally liable tortfeasor is entitled to a setoff from any adverse verdict in the amount of the cotortfeasor's settlement, and the noneconomic damages cap of MCL 600.1483, which limits a medical malpractice plaintiff's recovery of noneconomic damages. Specifically, we must decide whether the Legislature intended to abrogate the common-law setoff rule and, if not, the order in which the setoff rule and the noneconomic damages cap of MCL 600.1483 apply to a jury's verdict. Both the circuit court and Court of Appeals held, pursuant to *Markley v Oak Health Care Investors of*

Coldwater, Inc,[1] that the common-law setoff rule applies and that the setoff must be applied to the jury's verdict *before* application of the cap on noneconomic damages.

We agree that *Markley* was correctly decided and thus hold that the Legislature did not abolish the common-law setoff rule in the context of joint and several liability medical malpractice cases. We affirm the Court of Appeals in this regard and further clarify that where the Legislature has retained principles of joint and several liability, the common-law setoff rule applies. The lower courts' sequencing of the setoff and the noneconomic damages cap, however, results in an outcome contrary to the Legislature's requirement that medical malpractice plaintiffs "shall not" recover more noneconomic losses than the amount determined by MCL 600.1483. Rather, the Legislature has exercised its authority to limit a medical malpractice plaintiff's recovery by capping noneconomic losses and requiring the reduction of economic losses by the amounts paid by collateral sources. Because application of the setoff to the jury's verdict can result in a recovery beyond those statutorily mandated damages limitations, we further hold that a joint tortfeasor's settlement must be set off from the final judgment after application of the noneconomic damages cap of MCL 600.1483, as well as the collateral source rule. We therefore reverse that portion of the Court of Appeals' judgment affirming the circuit court's application of the common-law setoff rule.

I. FACTS AND PROCEDURAL HISTORY

In September 2001, plaintiff, Myriam Velez, filed suit against Detroit Receiving Hospital, Harper Hospital,

[1] *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245; 660 NW2d 344 (2003).

and Drs. Lawrence Schwartz and Martin Tuma, alleging that their failure to timely operate on her leg necessitated its amputation below the knee. After plaintiff filed her notice of intent to sue, the hospitals entered into a settlement agreement with plaintiff in which those defendants paid plaintiff a total of $195,000. After the settlement, plaintiff's lawsuit was dismissed by stipulation but without prejudice with respect to Tuma, who was not a part of the settlement agreement.

Plaintiff then filed a new complaint against defendant Tuma in January 2004, raising the same allegations against defendant.[2] After a four-day jury trial, the jury found defendant to be professionally negligent and returned a $1,524,831.86 verdict in plaintiff's favor. As required by MCL 600.1483(2), the jury itemized the verdict, separating it into past and future economic and noneconomic damages. The jury awarded plaintiff a total of $124,831.86 in economic damages and a total of $1.4 million in noneconomic damages.[3]

Before the circuit court entered a final judgment in plaintiff's favor, defendant requested that the circuit court apply the noneconomic damages cap to the jury's verdict and then subtract codefendants' $195,000 settlement from the final judgment. Plaintiff objected, relying on *Markley*, and argued that the circuit court was required to subtract codefendants' settlement from the jury's unadjusted "verdict."[4] The circuit court denied defendant's request, citing *Markley* for the propo-

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[2] Throughout the rest of this opinion, "defendant" refers to Tuma only, while "codefedants" refers to the hospital defendants that settled with plaintiff.

[3] MCL 600.1483(3) defines "noneconomic loss" as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss."

[4] *Markley*, 255 Mich App at 250-251.

sition that codefendants' settlement had to be applied to the jury's unadjusted "verdict," as opposed to the "judgment." The court agreed with plaintiff's interpretation of *Markley*:

> The question to the Court is whether or not I believe that Markley . . . stand[s] for the proposition that the verdict is subject to the set off. Or whether the judgment is subject to the set off.
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> The Court believes that Markley says verdict. I don't know what they meant, but I'll take it literally and we will apply it to the verdict. I will absolutely concur that that will result in a plaintiff receiving more money than the cap amount.

Thereafter, the circuit court entered a judgment awarding plaintiff $394,200, which is the amount of the noneconomic damages cap in this case.[5] To calculate this amount, the circuit court first subtracted codefendants' $195,000 settlement from the jury's total unadjusted verdict of $1,524,831. Because plaintiff's economic damages had been satisfied through collateral sources, the circuit court applied the collateral source rule and reduced plaintiff's economic damages to zero.[6] Finally, the circuit court reduced the remaining noneconomic damages to the amount of the statutory cap on noneconomic damages, $394,200. The circuit court entered a final judgment for plaintiff in

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[5] There is no dispute between the parties that plaintiff's noneconomic damages are capped at $394,200.

[6] In medical malpractice cases, the collateral source rule requires a circuit court to reduce a jury's award of economic damages by the amount already paid by collateral sources, such as insurers or other providers. MCL 600.6303. There is no dispute that plaintiff's total economic damages are eliminated by the collateral source rule because plaintiff has received, and will continue to receive, supplemental security income benefits from the Social Security Administration.

this amount.[7] Including the prior settlement amount, plaintiff's total recovery was $589,200.

In the Court of Appeals, defendant argued that the circuit court had erred by applying the setoff to the jury's unadjusted verdict rather than to the amount of the final judgment after applying the noneconomic damages cap. The Court of Appeals, however, affirmed the circuit court's decision to apply the setoff to the unadjusted verdict.[8] The Court first reasoned that the common-law setoff rule remained applicable in medical malpractice cases involving joint and several tortfeasors and that the rule should be applied so that a plaintiff will not be overcompensated for his or her actual loss. Turning to the question whether the setoff is to be applied to a jury's verdict or the final judgment after application of the noneconomic damages cap, the appeals panel could "discern no reason why the same principles that applied to the [now repealed] statutory right to setoffs [wherein prior settlements were set off against the verdict] should not apply to the common-

[7] The circuit court's calculation can be demonstrated as follows:

Total Jury Verdict	$1,524,831.86
Settlement Setoff	– $195,000
Post Setoff Verdict	$1,329,831.86
Economic Damages	$0 due to reduction for collateral sources
Noneconomic Damages	$394,200 due to statutory cap on noneconomic damages
Final Judgment	**$394,200**

[8] *Velez v Tuma*, 283 Mich App 396; 770 NW2d 89 (2009).

law right to setoffs . . . ."[9] Without addressing the language of the statute capping noneconomic damages, the Court of Appeals reasoned that "[i]n cases where joint and several liability is imposed, the trier of fact's determination of damages sets the limit regarding the amount a plaintiff can recover for his or her loss."[10] The Court thus concluded "that the application of the setoff rule to the jury verdict [which comprises a plaintiff's actual loss], rather than the final judgment, is proper."[11]

Defendant applied for leave to appeal in this Court, and plaintiff filed a cross-appeal. Initially, we denied both applications,[12] but we later granted defendant's motion for reconsideration and granted leave to appeal, limited to the issue "whether the Court of Appeals correctly held that the setoff amount in this case was properly set off against the jury verdict, before application of the noneconomic damages cap of MCL 600.1483 and calculation of the final judgment."[13] After hearing oral argument on that limited issue, we sua sponte reconsidered plaintiff's cross-application and granted leave to cross-appeal to consider "whether *Markley* . . . correctly decided that the common-law setoff rule applies in medical malpractice actions where joint and several liability is imposed."[14]

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[9] *Id*. at 412.

[10] *Id.* at 413.

[11] *Id*.

[12] *Velez v Tuma*, 488 Mich 903 (2010). Before our initial denial, we had held the case in abeyance for the resolution of issues not involved in this appeal. *Velez v Tuma*, 775 NW2d 146 (Mich, 2009).

[13] *Velez v Tuma (On Reconsideration)*, 489 Mich 956 (2011). With respect to defendant's remaining issue, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by the Court.

[14] *Velez v Tuma*, 491 Mich 873 (2012).

II. STANDARD OF REVIEW

The questions presented in these appeals are questions of law that we review de novo.[15] To the extent we must interpret the meaning of applicable statutes, our review is also de novo.[16]

III. EXISTENCE OF COMMON-LAW SETOFF RULE

Plaintiff argues that the Legislature abrogated the common-law setoff rule and thus any setoff of codefendants' settlement award is not warranted. In support, plaintiff posits that in 1995 PA 161, the Legislature clearly intended to abrogate the common-law rule when it repealed former MCL 600.2925d(b), as added by 1974 PA 318, which had codified the setoff rule and provided that a settlement "reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release . . . ."

The common law remains in force until "changed, amended or repealed."[17] Whether the Legislature has abrogated, amended, or preempted the common law is a question of legislative intent.[18] We will not lightly presume that the Legislature has abrogated the common law.[19] Nor will we will extend a statute by implication to abrogate established rules of common law.[20] "Rather, the Legislature 'should speak in no uncertain

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[15] *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008).

[16] *Id*.

[17] Const 1963, art 3, § 7.

[18] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).

[19] *Id*.

[20] *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981).

terms' when it exercises its authority to modify the common law."[21]

We cannot conclude that the Legislature intended to abolish the common-law setoff rule in the context of joint and several liability medical malpractice cases. While the pertinent statutes are silent with respect to the application of the common-law setoff rule, we cannot agree with plaintiff that the repeal of the statutory setoff, former MCL 600.2925d(b), by 1995 PA 161 demonstrates a clear intent to abrogate the common-law rule. Plaintiff's argument ignores the fact that the repeal of former MCL 600.2925d(b) was but one part of comprehensive tort-reform legislation and that there is no conflict between the common-law rule and the current legislation that would prevent the setoff's application. Those 1995 reforms abolished joint and several liability in most contexts and created an allocation-of-fault system in which each tortfeasor is liable only for the portion of the total damages that reflects that tortfeasor's percentage of fault.[22] Because a system of several liability already incorporates the fault of *all* tortfeasors in establishing every individual tortfeasor's proportion of fault, there is no danger that the plaintiff will be overcompensated for the injury by the failure to set off the amount of another tortfeasor's settlement.

The same comprehensive tort-reform legislation, however, also specifically retained "joint and several liability" in medical malpractice cases under MCL 600.6304(6)(a) where, as in the present case, the plain-

[21] *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010), quoting *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).

[22] 1995 PA 161 added MCL 600.2956 to the Revised Judicature Act to provide that "the liability of each defendant for damages is several only and is not joint."

tiff is determined to be without fault.[23] For reasons we explain, the Legislature's unambiguous intent to maintain joint and several liability in this context also evinces a clear intent to retain the common-law setoff rule in joint and several liability medical malpractice cases.

The term "joint and several" liability, as used in MCL 600.6304(6)(a), is a technical legal term. It has a long-acquired meaning that is well established in our jurisprudence: "[]Where multiple tortfeasors caused a single or indivisible injury, the injured party [may] either sue all tortfeasors jointly or he [may] sue any individual tortfeasor severally, and each individual tortfeasor [is] liable for the entire judgment . . . ."[24] Consistent with our rules of construction, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."[25] The Legislature's use of the term "joint and several" liability, therefore, indicates a plain intent to adopt that term's technical legal meaning.

Inherent in the meaning of joint and several liability is the concept that a plaintiff's recovery is limited to one compensation for the single injury.[26] Because in some

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[23] MCL 600.6304(6)(a) states that "joint and several" liability applies to a medical malpractice claim as long as the plaintiff is determined to be without fault.

[24] *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005); see also *Maddux v Donaldson*, 362 Mich 425, 433; 108 NW2d 33 (1961); *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928).

[25] MCL 8.3a.

[26] *Lawson*, 472 Mich at 49 ("[Under principles of joint and several liability,] each individual tortfeasor was liable for the entire judgment, although the injured party was entitled to full compensation only once."); *Verhoeks*, 244 Mich at 371 (" 'The injured party has the right to pursue

instances a jointly and severally liable tortfeasor settles before trial, the common-law setoff rule is necessary to ensure that the plaintiff does not recover more than a single recovery for the single injury. The common-law setoff rule entitles the remaining tortfeasors, who are still liable for the *entire* injury, to set off the amount of the cotortfeasor's settlement from any verdict rendered against them.[27] By reiterating that liability in most medical malpractice cases is joint and several, the Legislature thus retained the common-law setoff rule. When understood in this way, the purpose of the Legislature's repeal of the statutory setoff was not to abrogate the common-law setoff rule, but to acknowledge that a setoff does not apply in actions that involve several liability only.

The Court of Appeals' decision in *Markley* is consistent with this reasoning. There, the defendant sought a setoff against a jury verdict in the amount of the joint codefendant's settlement. The Court of Appeals rejected the circuit court's reasoning that the Legislature's repeal of former MCL 600.2925d(b) was intended to abrogate any common-law right to a setoff. Instead, the appeals court reasoned:

> [I]t is logical to conclude that common-law setoff in joint and several liability cases remained the law, where the new legislation was silent, where application of the common-law rule does not conflict with any current statutes con-

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[tortfeasors] jointly or severally at his election, and recover separate judgments; but, the injury being single, he may recover but one compensation.' ") (citation omitted).

[27] *Thick v Lapeer Metal Prod*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984) ("[W]here a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount.").

> cerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied. Considering the general nature and tone of tort reform legislation, we conclude that the Legislature did not intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of [MCL 600.2925d], but instead intended that common-law principles limiting a recovery to the actual loss would remain intact.[28]

Thus, the Court of Appeals held that "the principle of one recovery and the common-law rule of setoff, in the context of joint and several liability cases, continue to be the law in Michigan."[29]

After *Markley*, this Court in *Kaiser v Allen*[30] considered whether principles of joint and several liability and the common-law setoff rule applied in vehicle-owner vicarious-liability cases. After the jury returned a verdict in the plaintiff's favor, the defendant sought a setoff in the amount of his codefendant's settlement, which would reduce the plaintiff's award to zero. Because there can be no allocation of fault in vicarious-liability cases and there exists no amount of damages that belong to the vehicle owner separately from the negligent operator, we held that "[t]he tort-reform statutes do not apply to . . . vehicle-owner vicarious-liability cases . . . . Therefore, the common-law setoff rule remains the law in Michigan for vehicle-owner vicarious-liability cases."[31]

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[28] *Markley*, 255 Mich App at 256-257.

[29] *Id*. at 257. We disagree with plaintiff's characterization of *Markley* as "reviving" the common-law setoff rule. To the contrary, *Markley*'s reasoning, in our understanding, is consistent with our reasoning that the Legislature intended to preserve setoffs of a joint tortfeasor's settlement because the Legislature expressly retained joint and several liability in the medical malpractice context.

[30] *Kaiser*, 480 Mich 31.

[31] *Id*. at 36.

While the present case is factually dissimilar from *Kaiser*, the principles espoused in *Kaiser* nonetheless support our interpretation of the tort-reform statutes; mainly, that where the Legislature has retained joint and several liability, the common-law setoff rule remains intact. Indeed, as the Court of Appeals acknowledged in *Markley*, we are aware of no conflicting provision that would prevent the setoff's application, and plaintiff has identified none. Given our reasoning and our decision in *Kaiser*, we cannot hold that *Markley* was wrongly decided, as plaintiff urges. Accordingly, we hold that the common-law setoff rule remains the law in joint and several liability medical malpractice cases. We further clarify, consistent with our decision in *Kaiser*, that where the Legislature has specifically retained the technical common-law term "joint and several liability," the common-law setoff rule remains applicable.

IV. APPLICATION OF COMMON-LAW SETOFF RULE

Our conclusion that the common-law setoff rule remains applicable in joint and several liability cases does not end our analysis. Rather, we must address the issue of the sequence in which to apply the common-law setoff rule and the statutory cap on noneconomic damages to the jury's verdict. We therefore examine the interplay between the common-law rule and MCL 600.1483. We are cognizant that we are the stewards of the common law and that the Legislature is presumed to be aware of the common law when enacting legislation.[32] Our function in construing statutory language is to effectuate the Legislature's intent.[33] Plain and clear language is the best indicator of that intent, and such

[32] *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2d 684 (2005); *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997).

[33] *Nation*, 454 Mich at 494.

statutory language must be enforced as written.[34] Further, a statute in derogation of the common law will not be construed to abrogate the common law by implication, but if there is any doubt, the statute is to be given the effect that makes the least change in the common law.[35]

We agree with defendant that the lower courts erred by applying the setoff before applying the noneconomic damages cap, thereby allowing plaintiff to recover a total judgment beyond what Michigan law permits. While the Court of Appeals properly recognized that the common-law setoff rule applies in this case and is necessary to ensure that a plaintiff is not overcompensated for his or her injury, the Court erred by failing to address how the mandatory limitation on noneconomic damages affects application of the setoff.

As noted, MCL 600.1483(1) limits a plaintiff's damages for "noneconomic losses recoverable" and provides, in part:

> In an action for damages alleging medical malpractice by or against a person or party, the *total amount of damages for noneconomic loss recoverable* by all plaintiffs, resulting from the negligence of all defendants, *shall not exceed* $[394,200] . . . .[36]

This language mandates an absolute cap on all available noneconomic losses: a medical malpractice plaintiff's "total amount" of noneconomic damages "recoverable" "shall not exceed" the statutory cap. Use of the term "recoverable," giving it its plain meaning, denotes non-

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[34] *Driver v Naini*, 490 Mich 239, 247 n 24; 802 NW2d 311 (2011).

[35] *Nation*, 454 Mich at 494.

[36] Emphasis added. Although there is no dispute regarding the cap amount in this case, the amount of the cap is adjustable "at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index." MCL 600.1483(4).

economic losses that are capable of being recovered, which necessarily includes recovery through settlements, jury verdicts, or arbitration.[37] Because the term "total" modifies "amount of damages for noneconomic loss recoverable," it makes clear that all such sums recovered "shall not exceed" the cap. The Legislature, through the unambiguous language of MCL 600.1483(1), has then determined that a plaintiff's actual loss—and thus full compensation—for noneconomic losses caused by the single injury may be less than what a jury awards and may not in total exceed the statutory limit.[38]

Despite the unequivocal language of MCL 600.1483 limiting noneconomic damages, the statute is silent with respect to when the cap is to be applied both generally and in relation to the common-law setoff.[39] And while the common-law setoff rule is traditionally

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[37] In the absence of a statutory definition, we may rely on dictionary definitions. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 18; 651 NW2d 356 (2002). Black's Law Dictionary (9th ed) broadly defines "recoverable" to mean "[c]apable of being recovered." Justice HATHAWAY, however, claims that we have added language to MCL 600.1483 because the provision "makes no reference to settlements at all." *Post* at 36. This interpretation ignores entirely the breadth of the definition of the term "recoverable."

[38] Justice HATHAWAY mischaracterizes MCL 600.1483, and other provisions limiting damages, as measures that "preclude a plaintiff from receiving overcompensation," *post* at 32, and opines that a "court must determine whether the plaintiff is being overcompensated," *post* at 32, 33. As we have explained, however, by automatically limiting a verdict of noneconomic damages to the amount of the cap, MCL 600.1483 sets the total amount of compensation allowed. Because the cap represents a predetermined legislative policy limitation on a plaintiff's total compensation for noneconomic injuries, it forms the basis of determining to what extent a recovery for noneconomic damages *necessarily* represents overcompensation, and a court cannot exceed that predetermined limitation on compensation.

[39] MCL 600.6306 directs a trial court to make certain deductions from a jury's award of damages before entering a final judgment, but it does

applied to a jury's verdict, we do not view the statutory silence or the traditional application of the common-law setoff to be dispositive of the sequencing issue. Rather, the clear legislative directive of MCL 600.1483, when considered in juxtaposition with the purpose of the common-law setoff rule, provides the necessary guidance. Because a medical malpractice plaintiff cannot by operation of law recover more noneconomic damages than the statutory limit, it follows that a plaintiff's full recovery of noneconomic losses for the single injury—assuming the jury verdict exceeds the cap—is legislatively predetermined to be limited to the statutory amount. If a plaintiff has been partially compensated through a prior settlement from a jointly and severally liable tortfeasor, then the common-law setoff rule, consistent with its purpose and the statute, must be applied to ensure that the plaintiff is not compensated beyond statutorily permissible limits. To achieve this result, the

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not provide guidance with respect to application of the cap or the common-law setoff rule. MCL 600.6306 states in relevant part:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to [MCL 600.2959], the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> (a) All past economic damages, less collateral source payments as provided for in [MCL 600.6303].
>
> (b) All past noneconomic damages.
>
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under [MCL 600.6303(5)] reduced to gross present cash value.
>
> (d) All future medical and other health care costs reduced to gross present cash value.
>
> (e) All future noneconomic damages reduced to gross present cash value.

settlement must be subtracted from a jury verdict *after* application of the noneconomic damages cap, as well as the collateral source rule; otherwise, the plaintiff could recover more than his or her full compensation, that is, the plaintiff could recover the settlement amount, plus the amount of the cap and the amount of statutorily permissible economic damages, if any.[40]

Yet this is exactly what the lower courts did in this case. Neither the circuit court nor the Court of Appeals recognized that the Legislature has statutorily limited a medical malpractice plaintiff's recovery and that a setoff must be applied to ensure that the plaintiff does not recover an amount more than that which the Legislature has fixed by statute. Instead, the lower courts ignored the mandate of MCL 600.1483 and measured plaintiff's "actual loss," or full compensation, as the jury's verdict. This erroneous reasoning led to the legally incorrect conclusion that plaintiff's recovery for her single injury could not exceed the amount of the *verdict*, thereby justifying a setoff from the jury's verdict, rather than the judgment, after application of the noneconomic cap and collateral source rule.

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[40] Justice HATHAWAY contends that our application of the setoff creates a "new rule that bears little resemblance to the common-law setoff rule or its underlying purpose," *post* at 35, and that our failure to recognize the verdict as the measure of full compensation "disregards the obvious," *post* at 34. However, *before* the Legislature's creation of the cap on noneconomic damages, there was no need for the common law to make the distinction that we recognize. We have not, therefore, ignored that the setoff has traditionally been applied to the verdict. Rather, consistent with our jurisprudence, we have applied both the common-law rule and the statute in the manner that best gives effect to the purposes of both. See, e.g., *People v Nowack*, 462 Mich 392, 406; 614 NW2d 78 (2000) (noting that the common law is adopted into our jurisprudence to the extent that it is consistent with our state and federal constitutions and statutes). Consequently, it is the dissent's interpretation that fails to effectuate both the purpose of the statute and the common-law rule because, as the dissent does not dispute, its interpretation would allow a medical malpractice plaintiff to recover more than the statutorily limited amount.

By applying the setoff directly to the unadjusted verdict, the lower courts thus subverted both the clear directive of MCL 600.1483—that medical malpractice plaintiffs not recover noneconomic losses beyond the legislatively determined amount—and the purpose of the common-law setoff rule—to ensure that overcompensation does not occur. Under the lower courts' application of the cap and common-law setoff rule, plaintiff recovered $195,000 more than her actual loss as determined by the Legislature. Because plaintiff's economic losses were zero, because of collateral sources, the remaining final judgment of $394,200 after the cap was necessarily composed of only noneconomic losses. Plaintiff's total recovery from all joint tortfeasors, however, was $589,200—which is $195,000 more than that allowed by the collateral source rule and the cap on noneconomic damages.

Plaintiff would have us affirm the lower courts' erroneous application of the cap and rule, but her argument fails due to similar shortcomings. Like the Court of Appeals, plaintiff and Justice HATHAWAY's dissent assert that the measure of her actual losses for purposes of the setoff is the jury's verdict and that she can only be overcompensated for purposes of the common-law setoff rule if she receives more than the jury's verdict. Plaintiff cites both *Kaiser* and *Markley* for the proposition that the unadjusted jury verdict is the measure of the one full recovery to which plaintiff is entitled, but these cases are simply inapposite. *Kaiser* involved a vehicle owner's vicarious liability for those who drive the owner's vehicle, and there is no similar damages cap in the context of vehicle-owner vicarious-liability cases. It was not necessary for *Kaiser* to address the interaction between a statutory limitation on damages and the common-law setoff and, thus, distinguish between "judgments" and "jury verdicts" as the measure of the one full recovery to which a plaintiff is entitled. *Markley* also does not support

plaintiff's position. Indeed, *Markley* itself acknowledged that "there [was] no reason to address the damage cap" when applying the setoff rule.[41] Like in *Kaiser*, it was unnecessary for *Markley* to distinguish between "judgments" and "jury verdicts" as the measure of actual loss. Plaintiff also cites our decision in *Rittenhouse v Erhart*[42] for the same proposition, but *Rittenhouse* is likewise unhelpful because it did not address the interaction between the damages cap and the common-law setoff rule.[43]

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[41] *Markley*, 255 Mich App at 258.

[42] *Rittenhouse v Erhart*, 424 Mich 166; 380 NW2d 440 (1985).

[43] As additional support, plaintiff and Justice HATHAWAY argue that MCL 600.1483 does not limit the total amount of noneconomic damages plaintiff may recover because MCL 600.1483(1) only applies to jury awards, not settlements. Specifically, the dissent posits that MCL 600.1483(1) applies only to jury awards because the language of MCL 600.1483(2), which requires juries "awarding damages" to "itemize damages," refers only to jury awards. This conclusion does not logically follow when the subsections are read together because MCL 600.1483(1) makes no reference to a jury award, but uses the broader phrase "the total amount of damages for noneconomic loss recoverable . . . ." Justice HATHAWAY further asserts that the Legislature only intended jury awards, not settlements, to be reduced by the noneconomic damages cap because MCL 600.6304(5) is silent with respect to any reduction by reason of a settlement. *Post* at 37. That provision requires a circuit court to reduce an excessive "award of damages" to the amount of the noneconomic damages cap. This silence, however, does not preclude a court from applying the common-law setoff rule *after* applying the noneconomic damages cap to the jury verdict. Finally, these arguments are unavailing because to interpret the noneconomic damages cap as applying only to jury awards and not settlements would render nugatory the term "recoverable" in MCL 600.1483(1), which as we have explained does not delimit the manner in which recovery is obtained. Plaintiff and the dissent's construction is one we cannot adopt because we " 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute . . . nugatory.' " *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004) (citation omitted). Justice HATHAWAY, like plaintiff, simply neglects to consider that the Legislature did not intend a plaintiff to recover noneconomic damages greater than that allowed by the statute and that plaintiff's recovery of noneconomic damages is, in effect, set by law.

Accordingly, we hold that where principles of joint and several liability apply in a medical malpractice case and a codefendant has settled a plaintiff's claim before trial, a circuit court must first apply to the jury's verdict the noneconomic damages cap, as well as any other statutorily required adjustments, before reducing the award by the amount of the codefendant's settlement. Here, plaintiff received a settlement from codefendants in the amount of $195,000. At a later trial against defendant, the jury returned a verdict for plaintiff for $1,524,831.86. Given our holding, it was error for the lower courts to apply the setoff against the jury's verdict. Rather, the proper order of operation was to first apply both the collateral source rule and the noneconomic damages cap to arrive at the final judgment, which is plaintiff's full compensation for her injury as determined by the Legislature.[44] Because plaintiff has already received partial compensation for that injury, application of the common-law setoff rule requires that codefendants' settlement be subtracted from the final judgment so that plaintiff does not receive more than a single recovery for her single injury.[45] Consequently, plaintiff is entitled to a judgment

[44] Justice CAVANAGH criticizes this application of the setoff rule because it "provides defendants with both the benefit of the damages cap and the further reduction of the common-law setoff." *Post* at 28. Yet this result is exactly what we intend because it is also what the Legislature intends. Had the Legislature intended to preclude this result from inuring to the benefit of a medical malpractice defendant, it could have used a phrase less broad than "total amount of damages for noneconomic loss recoverable" in MCL 600.1483(1) or otherwise prohibited any application of the setoff rule.

[45] By allegedly reducing plaintiff's "noneconomic damages award" by the amount of the settlement, Justice HATHAWAY is concerned that our decision has assumed that the settlement proceeds consisted of noneconomic damages and that this result "ignores the actual agreement of the settling parties." *Post* at 39. These concerns are unfounded. Our holding does not require the reduction of plaintiff's noneconomic damages by the amount of the settlement. Rather, our holding requires a court to subtract the entire amount of the settlement from *whatever* damages

against defendant in the amount of $199,200.[46]

This result and our holding are in accord with decisions of other jurisdictions with similar damages-cap statutes. In *Fairfax Hosp Sys, Inc v Nevitt*,[47] the Virginia Supreme Court ruled that the $1 million cap on medical malpractice damages reduces a verdict before any settlements are set off against it: "[W]here there is a verdict by a jury or a judgment by a court against a health care provider for 'injury to . . . a patient' and the total amount recovered in that action and in all settle-

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remain after applying the relevant statutory adjustments. Nor have we assumed that the settlement in this case was composed solely of noneconomic damages. Indeed, as the dissent admits, the settlement was an aggregate award for all the damages, including economic and noneconomic damages, costs, attorney fees, and interest. As an aggregate award, subtraction of the settlement from the adjusted verdict in this case does not alter the terms of the settling parties' agreement. While collateral sources that exist in this case happened to reduce the economic damages to zero, the order-of-operations rule that we establish today applies to *all* adjusted verdicts, whether they contain only economic damages, only noneconomic damages, or some combination thereof.

[46] This equation can be summarized as follows:

Total Jury Verdict	$1,524,831.86
Economic Damages	$124,831.86, reduced to $0 by collateral sources
Noneconomic Damages	$1,400,000, reduced to $394,200 due to cap on noneconomic damages
Settlement Setoff	– $195,000
Final Judgment	**$199,200**

[47] *Fairfax Hosp Sys, Inc v Nevitt*, 249 Va 591, 599; 457 SE2d 10 (1995) (citation omitted).

ments related to the medical malpractice injury exceeds one million dollars, the total amount the plaintiff can recover for that injury is one million dollars." Similarly, in *Lockshin v Semsker*,[48] the Maryland Court of Appeals ruled that "any verdict rendered by a jury exceeding the amount of the non-economic damages cap inherently is a verdict in the amount of the cap from the moment it is rendered." The court therefore concluded that "the appropriate order of operations is to apply first the cap to the jury's verdict for non-economic damages, followed by a credit for the joint tortfeasor settlement."[49]

Plaintiff criticizes this position and claims that it requires the itemization of settlements. Plaintiff's position actually causes this perceived harm, however. When a judgment contains both economic and noneconomic damages, a circuit court applying the setoff to the jury's verdict *before* application of the collateral source rule would have to determine how to allocate the settlement between economic and noneconomic damages. This is a result we cannot condone, not only because it can result in an outcome contrary to the mandate of MCL 600.1483, but also because it could discourage settlements in instances in which there are

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[48] *Lockshin v Semsker*, 412 Md 257, 283; 987 A2d 18 (2010).

[49] *Id*. Numerous other jurisdictions have also required application of noneconomic damages caps before setting off a settlement so that plaintiffs do not recover more damages than permitted by the applicable law. See *Mayes v Bryan*, 139 Cal App 4th 1075, 1099-1103; 44 Cal Rptr 3d 14 (2006) (holding that the trial court properly applied the noneconomic damages cap, Cal Civ Code 3333.2, first before reducing the judgment by the percentage of fault attributed to the settlement the plaintiff had already recovered because "the plaintiff could not recover more than $250,000 in noneconomic damages from all health care providers for one injury,"); *Garhart v Columbia/Healthone, LLC*, 95 P3d 571, 591 (Colo, 2004) (holding that noneconomic damages cap allowing a total recovery of $250,000, Colo Rev Stat 13-64-302, must be applied to a jury's verdict first before allocating fault attributed to a settlement, so that the plaintiff does not recover more than the cap).

multiple related defendants.[50] Additionally, in instances like the present, in which the composition of the settlement is unknown, circuit courts would be left to guess at how a settlement should be allocated. Requiring circuit courts to engage in this guesswork, from which a range of potential outcomes could result, unreasonably burdens them with a determination that they are, in the absence of any statutory guidance, ill-prepared to make. Our holding, on the other hand, that a circuit court must subtract the total settlement from the final judgment, creates no need to allocate the settlement proceeds between economic or noneconomic damages before applying the setoff. Rather, the settlement is treated as an aggregate award to be applied against the plaintiff's total actual loss, meaning the final judgment after application of the applicable statutory adjustments.

V. CONCLUSION

To the extent the Legislature has not abolished principles of joint and several liability, those principles and the common-law setoff rule remain the law in Michigan. *Markley* reached this same conclusion, and we decline plaintiff's invitation to conclude that *Markley* was wrongly decided. Further, when joint and several liability principles apply in medical malpractice cases, any settlement must be set off from the final judgment after application of the noneconomic damages cap and the collateral source rule. The lower courts

[50] Under plaintiff's rule, medical malpractice plaintiffs would have an incentive to structure settlement agreements as entirely economic damages, especially when the plaintiff expects collateral sources to wipe out all economic damages. The settling codefendants, however, might be unwilling to enter into such an agreement, knowing that it could potentially prejudice their associates and potentially sour business relationships.

erroneously set off codefendants' settlement against the jury's verdict, which resulted in plaintiff receiving $195,000 more for her injury than permitted by law. Accordingly, we reverse the portion of the Court of Appeals' judgment upholding the circuit court's application of the common-law setoff rule and remand to the circuit court for entry of an order reducing the final judgment by $195,000.

YOUNG, C.J., and MARKMAN (except for the fourth sentence of the third paragraph on page 11) and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

MARKMAN, J. (*concurring*). I concur in the majority opinion with the exception of the majority's statement that "we will [not] extend a statute by implication to abrogate established rules of common law." *Ante* at 11. I *do* believe that a statute may by implication abrogate established rules of common law. That is, the Legislature does not have to explicitly state that it is abrogating a common-law right in order for it to abrogate a common-law right. The Legislature's intent to abrogate the common law may be sufficiently clear without its having to explicitly state that this is its intent. A legislative body need not provide a running commentary of the effect of its actions on the common law when its actions will admit of only the most obvious interpretation. The statement is unnecessary to the opinion, and no injury would be done to the opinion were it not there. I join the majority because I believe the Legislature has not, either expressly *or* implicitly, abrogated the common-law setoff rule in the context of joint and several liability medical malpractice cases.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with both the majority and dissenting

opinions that the common-law setoff rule applies in the context of joint and several liability medical malpractice cases. There is no indication that the Legislature intended to abrogate the common-law setoff rule when it eliminated the statutory setoff rule in MCL 600.2925d(b).[1] Contrary to plaintiff's argument, in the absence of clear legislative intent to abrogate the common law, "[t]he repeal of a statute revives the common-law rule as it was before the statute was enacted." *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995).

I would, however, affirm the judgment of the Court of Appeals with respect to how the common-law setoff rule should be applied because, in my view, the panel did not clearly err by holding that the common-law setoff should be applied as it traditionally has been—to the unadjusted jury verdict. To apply the common-law setoff after the operation of the medical malpractice noneconomic-damages cap provides defendants with both the benefit of the damages cap and the further reduction of the common-law setoff. I agree with Justice HATHAWAY that the jury verdict represents the total amount of damages a plaintiff is entitled to recover and that applying the common-law setoff to the unadjusted jury verdict before operation of the damages cap ensures that plaintiff is not overcompensated for a single, indivisible injury. Further, applying the common-law setoff to the unadjusted jury verdict does not impair the protections afforded to a defendant by the medical malpractice damages cap, as the Legislature intended.

MARILYN KELLY, J., concurred with CAVANAGH, J.

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[1] Former MCL 600.2925d(b), as added by 1974 PA 318, was deleted by 1975 PA 161.

HATHAWAY, J. (*dissenting*). I generally agree with the majority that when a trier of fact determines that a plaintiff in a medical malpractice case is not comparatively negligent, the common-law setoff rule applies. However, I disagree with the manner in which the majority applies this rule because it does so in a fashion that is contrary to the rule's purpose. Because today's decision departs from the common-law setoff rule, I respectfully dissent.

For many years, the rule in this state was that concurrent tortfeasors were held to be jointly and severally liable. Joint and several liability operated to place the full burden of the injustice on a tortfeasor, rather than on the injured party.[1] When a defendant is jointly and severally liable, that defendant is liable for all the injured party's damages, including damages for injury caused by a codefendant or a nonparty, in order to ensure that an injured party is fully compensated.[2]

A corollary of joint and several liability is the common-law setoff rule.[3] Common-law setoff is grounded in the principle that an injured party is entitled to only one recovery for a single, indivisible injury and precludes an injured party from receiving a double recovery.[4] Thus, historically, when an injured party suffered a single, indivisible injury as a result of the negligent conduct of two or more tortfeasors, any amount paid by a settling defendant was "set off" or subtracted from the verdict awarded by the trier of

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[1] See *Maddux v Donaldson*, 362 Mich 425, 432-434; 108 NW2d 33 (1961); *Velez v Tuma*, 283 Mich App 396, 409; 770 NW2d 89 (2009); *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 471-472; 713 NW2d 285 (2006).

[2] *Id*.

[3] *Kaiser v Allen*, 480 Mich 31, 41; 746 NW2d 92 (2008) (KELLY, J., concurring).

[4] See *Larabell v Schuknecht*, 308 Mich 419, 423; 14 NW2d 50 (1944).

fact.[5] The common-law application of setoff carried out the purpose of the rule: the injured party was fully compensated, but not overcompensated.[6]

The common-law setoff rule was codified in former MCL 600.2925d by 1974 PA 318 and this statutory version of the setoff rule was applied in the same manner as it was at common law in instances in which the defendants were jointly and severally liable. However, statutory setoff was subsequently eliminated by 1995 PA 161, along with joint and several liability for virtually all tort claims.[7] Because no relevant statute currently addresses setoff, the question arises whether the Legislature intended common-law setoff to apply to the limited categories of tort claims for which joint and several liability was retained.[8] Although factually dissimilar to this case, *Kaiser v Allen*, 480 Mich 31; 746 NW2d 92 (2008), provides guidance in answering this question.

Kaiser addressed the issue of whether the common-law setoff rule applies to claims against owners and operators of motor vehicles when vicarious liability is statutorily imposed. In holding that the common-law setoff rule applies to such cases, this Court explained:

> The common-law setoff rule is based on the principle that a plaintiff is only entitled to one full recovery for the same injury. An injured party has the right to pursue multiple tortfeasors jointly and severally and recover separate judgments; however, a single injury can lead to only a single compensation.

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[5] *Id.*

[6] *Kaiser*, 480 Mich at 39-40.

[7] MCL 600.2956.

[8] See, for example, MCL 600.2956, which retains vicarious liability for employers, and MCL 257.401(1), which retains vicarious liability for vehicle owners.

> . . . Allowing plaintiff to recover the entire verdict against Allen [vehicle owner] and to retain all the proceeds from the settlement with [the vehicle's operator] would allow the plaintiff to recover four times more than the jury determined plaintiff should be awarded for his injuries. The Legislature did not intend that a plaintiff be awarded damages greater than the actual loss in vicarious-liability cases, resulting in a double recovery. The common-law setoff rule should be applied to ensure that a plaintiff only recovers those damages to which he or she is entitled as compensation for the whole injury. . . .
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> * * *
>
> To the extent that joint and several liability principles have not been abrogated by statute, they remain intact, and the common-law setoff rule remains the law in Michigan with regard to vehicle-owner vicarious-liability cases.[9]

Thus, *Kaiser* recognized that when a party suffers a single, indivisible injury as the result of the conduct of multiple tortfeasors, the injured party is entitled to be made whole. This means that the injured party is entitled to be fully compensated, but not overcompensated. I see no reason why the principles set forth in *Kaiser* should not be extended to the category of medical malpractice claims that also retain joint and several liability.[10]

Moreover, I believe that in *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 256-257; 660 NW2d 344 (2003), the Court of Appeals correctly reasoned that

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[9] *Kaiser*, 480 Mich at 39-40 (citation omitted).

[10] Medical malpractice claims are bifurcated into two categories on the basis of whether the plaintiff is comparatively negligent. Under MCL 600.6304(6)(b), when a plaintiff is comparatively negligent, joint and several liability has been abolished, and the defendants' liability is several. When a plaintiff is not comparatively negligent, joint and several liability is imposed under MCL 600.6304(6)(a).

> [w]ith tort reform and the switch to several liability, it is logical to conclude that common-law setoff in joint and several liability cases remained the law . . . where application of the common-law rule does not conflict with any current statutes concerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied.

Thus, *Markley* correctly held that in medical malpractice cases that retain joint and several liability, the common-law setoff rule applies. However, with that said, if the common-law setoff rule is to be imposed in the absence of statutory authority, it must be applied in the same manner and for the same purpose as it was at common law. Otherwise, the common-law setoff rule is not being applied; instead, an entirely new rule is created.

The undisputed historical purpose of the common-law setoff rule was to preclude a plaintiff from being overcompensated for a single, indivisible injury.[11] That is its only goal. The common-law setoff rule accomplished this goal by subtracting any settlement amount for that injury from the trier of fact's determination of the *entire* amount of the injured party's damages. When applying the common-law setoff rule to medical malpractice cases under the current statutory scheme, the goal of preventing overcompensation remains the same.

In analyzing whether a medical malpractice plaintiff has been overcompensated, we must be mindful of the so-called "tort reform" liability statutes that contain measures to preclude a plaintiff from receiving overcompensation in many regards. For example, the fact-finder is required to separate all economic damages from noneconomic ones,[12] with future damages item-

[11] *Kaiser*, 480 Mich at 39-40.

[12] MCL 600.6305(1)(a) and (b).

ized on a year-by-year basis[13] and any future damages reduced to present cash value.[14] Economic damages are subject to statutory setoff for payments made by a collateral source.[15] Payment for future damages exceeding $250,000 may be satisfied by the purchase of an annuity contract.[16] Noneconomic damages awarded at trial are subject to two different limitations based on the nature of the injury.[17] Each of these measures serves to reduce the amount that an injured party may ultimately receive in a judgment entered as a result of a verdict rendered in his or her favor. These measures greatly reduce the possibility that a medical malpractice plaintiff can be overcompensated.

To determine whether a medical malpractice plaintiff has actually been overcompensated, a multistep analysis is required that considers all the principles discussed above. The first step is to consider whether the plaintiff was comparatively negligent. If the plaintiff was comparatively negligent, a defendant's liability is several and, as such, the defendant is only responsible for his or her pro rata share of the plaintiff's damages.[18] In these instances, the issue of setoff is irrelevant because there is no possibility of the plaintiff being overcompensated. On the other hand, if the jury determines that the plaintiff was not comparatively negligent, the court must determine whether the plaintiff is being overcompensated and, if so, the common-law setoff rule is applicable. In these instances, after a verdict has been rendered, any settlement amounts paid for damages

[13] MCL 600.6305(1)(b).

[14] MCL 600.6306(1)(c).

[15] MCL 600.6303.

[16] MCL 600.6307.

[17] MCL 600.1483.

[18] MCL 600.6304(6)(b).

arising from that single, indivisible injury must be set off in the same manner and for the same purpose as at common law—to prevent overcompensation. Thus, settlement amounts should be subtracted from the amount that the trier of fact determines is the full amount that the plaintiff is entitled to recover so that the plaintiff is made whole, but not overcompensated.[19]

The majority opines that the verdict must first be reduced by the applicable limitation on noneconomic damages;[20] then, only *after* the verdict is reduced to that amount, is any settlement set off or subtracted from the reduced award. Additionally, under the majority's analysis, the entire amount of the settlement proceeds must be set off from the noneconomic-damages portion of the plaintiff's adjusted net verdict, without any consideration of whether all the settlement proceeds were intended to compensate the plaintiff for noneconomic damages. I disagree with this analysis.

The majority applies setoff in a manner that is at odds with the common-law rule, which was used to prevent a plaintiff from receiving a double recovery or overcompensation for a single, indivisible injury. The majority seemingly disregards the obvious—the trier of fact determines the total amount of a plaintiff's damages, and only when a plaintiff receives more than that amount as compensation is the plaintiff overcompensated. A plaintiff is not overcompensated when he or she receives less than the trier of fact's determination of the amount that is required to make him or her whole. The goal of the common-law setoff rule is merely to

[19] As will be discussed, MCL 600.6305 requires damages to be separated into economic and noneconomic damages and, accordingly, only amounts paid for like damages should be set off.

[20] The limitations on damages contained in MCL 600.1483 are commonly referred to as "caps" on noneconomic damages.

prevent overcompensation; it is not to further undercompensate the plaintiff. Unfortunately, the majority's method of applying this rule fails to achieve the goal of common-law setoff. While the majority asserts that it is applying "common-law setoff," it instead creates a new rule that bears little resemblance to the common-law setoff rule or its underlying purpose. It is axiomatic that if a common-law rule is to be used, it should be applied in the manner and for the purposes that it was intended at common law. To do otherwise defies logic and does nothing more than judicially create a new rule in order to fill what the creator of the new rule perceives to be a statutory void.

The majority counters that its manner of applying the common-law setoff rule is mandated by the language of MCL 600.1483(1), which sets forth the limitations on damages.[21] The majority claims that the limitations in this subsection preclude any recovery above

[21] The full text of MCL 600.1483 provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to [MCL 600.6304], in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (*i*) Injury to the brain.
>
> (*ii*) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

that amount regardless of whether an award of damages by a trier of fact is involved. I disagree. The majority reaches its conclusion by myopically focusing on a few selected words of MCL 600.1483(1), rather than the entirety of that subsection, and then adds language to that subsection that does not exist. It argues that because MCL 600.1483(1) uses the terms "total amount," "recoverable," and "shall not exceed," recoverable noneconomic losses "necessarily include[] recovery through settlements, jury verdicts, or arbitration."[22] However, contrary to the majority's position, subsection (1) makes no reference to settlements at all. Moreover, when MCL 600.1483 is read as a whole and in conjunction with MCL 600.6304, as was intended, it is clear from the text of those sections that the limitations on damages are only intended to be applied to awards of damages, not settlements.

The majority's analysis ignores the full language of MCL 600.1483(2), which requires the "trier of fact" to

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(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

[22] *Ante* at 17-18.

segregate the economic and noneconomic elements of damages. This language logically means that only awards by a trier of fact are within the scope of the subsection, not settlements, which do not involve a trier of fact. More importantly, MCL 600.6304(5) mandates that only following an "award of damages" is the court to reduce that "award" of noneconomic damages to the appropriate limitation found in MCL 600.1483. MCL 600.6304(5) provides:

> In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

However, no comparable language can be found allowing a court to reduce awards by the amount of a *settlement*. Thus, two logical conclusions can be drawn from the actual text of this provision. First, the Legislature did not intend to preclude a trier of fact from determining the full amount of recovery that is necessary to make the plaintiff whole and, second, the Legislature only intended awards by a trier of fact to be reduced to the noneconomic-damages limitation. If the Legislature had intended the interpretation adopted by the majority, it would be logical to assume that it would have made some reference to settlement somewhere in the statutory scheme. Instead, the statutory scheme is *silent* with respect to settlements. While the absence of such language does not preclude common-law setoff, the common-law setoff rule is only applicable when overcompensation is involved. When there is no overcompensation, the common-law setoff rule does not apply. In the absence of statutory authority, and in situations

where the common-law setoff rule does not apply, there is simply no basis to apply the reduction in the manner that the majority requires.

In this case, a jury determined that as a result of defendant Dr. Tuma's negligence, plaintiff Ms. Velez's left leg had to be amputated. The jury found that defendant was both professionally negligent and the proximate cause of plaintiff's injuries. The jury returned a verdict in plaintiff's favor that included $124,831.86 in economic damages and $1.4 million in noneconomic damages for a total verdict of $1,524,831. It is the total verdict that constitutes full recovery and makes plaintiff whole. Only if she receives more than this total amount would she be receiving a double recovery or overcompensation. Plaintiff is clearly not receiving a double recovery or overcompensation because the trial court reduced the amount the jury determined would make her whole to $394,200.[23] The trial court reached this judgment amount by first subtracting the settling codefendants' payment to plaintiff ($195,000) from the jury's total verdict ($1,524,831) and then reducing the net verdict ($1,329,831) to the amount required under MCL 600.6303 (in this instance, the noneconomic-damages limitation was $394,200). The Court of Appeals affirmed this equation. I agree with the trial court and the Court of Appeals, and the majority errs by failing to

[23] The jury verdict included a total of $124,831.86 in economic damages and a total of $1,400,000 in noneconomic damages. Economic damages were reduced pursuant to MCL 600.6304(3) to zero, because all economic damages had been paid by a collateral source. Noneconomic damages were reduced pursuant to MCL 600.6304(5) to the amount of the applicable limitation on damages, which at the time was $394,200. The final judgment totaled $649,655.59, which included the reduced verdict in the amount of $394,200, as well as $43,000 in taxable costs, $105,812.50 for attorney fees, and $106,643.09 in statutory interest covering the period up to the date of the judgment.

take this approach. Rather than applying the common-law setoff rule, the majority creates a new rule and simply calls it "common-law setoff." I cannot agree with this approach.

My final concern regarding the majority's decision is that it concludes that the entire amount of plaintiff's prior settlement with Tuma's codefendants must be set off or subtracted from plaintiff's noneconomic-damages award. I find this action considerably troubling because it ignores the actual agreement of the settling parties. The settlement agreement between plaintiff and the settling codefendants is contained in a document entitled "Covenant Not to Sue Agreement." The total settlement amount was $195,000, and the agreement specifically states the settlement is for *all* the damages including economic, noneconomic, costs, attorney fees, and interest. This settlement was intended to resolve *all* of plaintiff's claims with the settling codefendants. Pursuant to the unambiguous terms of the agreement, the amount of $195,000 was not allocated into any specific category of damages. As such, there is no logical way to conclude that *all* the settlement proceeds were for noneconomic damages. Despite this, the majority ignores the terms of the agreement and instead assumes that the entire settlement was for noneconomic damages that are limited by the noneconomic-damages limitation contained in MCL 600.1483. Because an agreement between the parties is a contract, the majority is not free to alter its unambiguous terms by making such an assumption.[24]

For all the foregoing reasons, I respectfully dissent.

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[24] *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005); *Lintern v Mich Mut Liability Co*, 328 Mich 1, 4; 43 NW2d 42 (1950).

CEDRONI ASSOCIATES, INC v TOMBLINSON, HARBURN ASSOCIATES, ARCHITECTS & PLANNERS, INC

Docket No. 142339. Argued March 6, 2012. Decided July 27, 2012.

Cedroni Associates, Inc., the lowest bidder for a school construction project of the Davison Community Schools, brought an action in the Genesee Circuit Court against Tomblinson, Harburn Associates, Architects & Planners, Inc. (an architectural firm the school district had hired to assist with the bid-selection process by reviewing and evaluating bid applications, investigating competing contractors and their references, expressing opinions and views on contractor competence and workmanship, and making recommendations regarding which contractor should be awarded the project), after the school district awarded the contract for the project to the second-lowest bidder following defendant's recommendations. Plaintiff alleged tortious interference with a business expectancy. The court, Judith A. Fullerton, J., granted summary disposition in favor of defendant, concluding that plaintiff lacked a valid business expectancy in being awarded the contract. Plaintiff appealed. The Court of Appeals, MURPHY, C.J., and STEPHENS, J. (K. F. KELLY, J., dissenting), reversed, concluding that a genuine issue of material fact existed with respect to the elements of plaintiff's cause of action. 290 Mich App 577 (2010). Defendant applied for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action. 489 Mich 953 (2011).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices MARY BETH KELLY and ZAHRA, the Supreme Court *held*:

As the lowest bidder on a public contract, plaintiff had no valid business expectancy for the purpose of sustaining a claim of tortious interference with a business expectancy. A disappointed low bidder on a public contract has no standing to sue in order to challenge the award of a contract to another bidder.

1. The elements of tortious interference with a business expectancy are (1) the existence of a valid business relationship or expectancy, (2) the defendant's knowledge of the relationship or expectancy, (3) an intentional interference by the defendant induc-

ing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff. In order to establish a valid business expectancy, the expectancy must be a reasonable likelihood or probability, not mere wishful thinking.

2. A disappointed low bidder on a public contract has no standing to sue the public entity because its bid was rejected even when the public entity was required to let the contract to the lowest responsible bidder because such requirements are enacted for the protection of property holders and taxpayers, not for the benefit of bidders.

3. A plaintiff's expectations are the same regardless of whether the plaintiff alleges that the government wrongfully denied it the contract or that a third party interfered and caused a denial of the contract. Awarding governmental contracts is a highly discretionary process, and under MCL 380.1267(6), a school board may reject any or all bids. In light of the common-law rule that the bidder submitting the lowest bid has no cause of action against the public entity that rejects the bid and the statutory provision that allows the school district to reject any or all bids, a bidder on a school construction project should know that its submission of the lowest bid does not create a reasonable probability that the school district will award it the contract. In this case, documents provided by the school district before plaintiff submitted its bid also stated that the district reserved the right to reject any or all bids. Although the district's fiscal management policy provided that the contract would be awarded to the "lowest responsible bidder," the district retained the right to choose the "lowest responsible bidder." Because the district retained a broad discretionary right to reject the lowest bidder, plaintiff could not have had a valid business expectancy.

4. Courts may only interfere with the public entity's exercise of discretion to accept or reject bids for public contracts when necessary to prevent fraud, injustice, or the violation of a trust. No evidence was presented that intervention was necessary to prevent fraud, injustice, or the violation of a trust in this case.

Reversed; order granting summary disposition in favor of defendant reinstated.

Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, dissenting, would have affirmed the judgment of the Court of Appeals. To avoid summary disposition, plaintiff had to assert a specific and reasonable prospective economic advantage that was interfered with, not a guaranteed relationship. Plaintiff presented evidence establishing that it had a realistic expectation that it would qualify as a responsible bidder. This conclusion, in turn, gave rise to a question of material fact about whether

plaintiff, as the lowest bidder, had a valid business expectancy in being awarded the contract, and summary disposition was improper. The disappointed-bidder rule, which generally holds that a disappointed bidder on a public contract does not have a cause of action regardless of the bidder's qualifications or the value of the bid offered, has normally been applied only when the plaintiff filed suit against the contracting governmental entity rather than another private entity. All the cases cited by the majority in support of its decision to extend the disappointed-bidder rule to suits between private entities were both unpublished and distinguishable. Plaintiff presented evidence that defendant's opinion and recommendation to the school district regarding plaintiff's qualifications might have been improperly influenced by animosity related to problems between plaintiff and defendant. When a private entity intentionally provides inaccurate or misleading information to a governmental entity and the governmental entity in turn relies on that information in making a contracting decision, the private entity has injected dishonesty and bad faith into the decision-making process. Accordingly, the bidding process results in an injustice, and courts may intervene without impermissibly interfering with the governmental entity's exercise of discretion in making contracting decisions.

1. TORTS — INTERFERENCE WITH A BUSINESS EXPECTANCY — ELEMENTS.

The elements of tortious interference with a business expectancy are (1) the existence of a valid business relationship or expectancy, (2) the defendant's knowledge of the relationship or expectancy, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff; in order to establish a valid business expectancy, the expectancy must be a reasonable likelihood or probability, not mere wishful thinking.

2. PARTIES — STANDING — PUBLIC CONTRACTS — LOW BIDDERS.

A disappointed low bidder on a public contract has no standing to sue the public entity because its bid was rejected even when the public entity was required to let the contract to the lowest responsible bidder because such requirements are enacted for the protection of property holders and taxpayers, not for the benefit of bidders.

3. SCHOOLS — CONSTRUCTION CONTRACTS — REJECTION OR ACCEPTANCE OF BIDS — DISCRETIONARY DECISIONS — LOW BIDDERS — VALID BUSINESS EXPECTANCY.

The low bidder on a school construction project does not have a valid business expectancy in the award of the contract; the award of

governmental contracts is highly discretionary, and by statute a school board may reject any or all bids (MCL 380.1267[6]).

4. CONTRACTS — PUBLIC CONTRACTS — REJECTION OR ACCEPTANCE OF BIDS — DISCRETIONARY DECISIONS — FRAUD, INJUSTICE, OR VIOLATION OF A TRUST.

Courts may only interfere with a public entity's exercise of discretion to accept or reject bids for public contracts when necessary to prevent fraud, injustice, or the violation of a trust.

McAlpine & Associates, P.C. (by *Mark L. McAlpine* and *Ryan W. Jezdimir*), for plaintiff.

Sullivan, Ward, Asher & Patton, P.C. (by *Ronald S. Lederman* and *Kevin J. Gleeson*) for defendant.

Amicus Curiae:

Frederick F. Butters, PLLC (by *Frederick F. Butters*), for the American Institute of Architects – Michigan.

MARKMAN, J. The issue here is whether plaintiff, the disappointed lowest bidder on a public contract, had a valid business expectancy for the purpose of sustaining a claim of tortious interference with a business expectancy. The trial court held that plaintiff did not have such an expectancy, but a divided Court of Appeals panel held that a genuine issue of material fact exists in this regard. Because we agree with the trial court and the Court of Appeals dissent that plaintiff did not have a valid business expectancy, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting defendant's motion for summary disposition.

I. FACTS AND HISTORY

Davison Community Schools, a public school district, entered into a contract with defendant for architectural services with regard to a construction project. As part of the contract, defendant agreed to assist the school district

with the bid selection process by, among other things, evaluating the bids submitted by contractors and making a recommendation to the school district regarding which contractor should be awarded the project. Pursuant to defendant's recommendation, the school district eventually awarded the project to US Construction and Design Services, LLC, the contractor that had submitted the second-lowest bid. Plaintiff, the contractor that submitted the lowest bid, sued defendant for tortious interference with a business expectancy.[1]

The trial court granted defendant's motion for summary disposition, concluding that plaintiff did not have a valid business expectancy. In a split decision, the Court of Appeals reversed, holding that a genuine issue of material fact existed in this regard. *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 290 Mich App 577; 802 NW2d 682 (2010). Judge KIRSTEN FRANK KELLY dissented, agreeing with the trial court that plaintiff did not have a valid business expectancy. We ordered and heard oral argument on whether to grant defendant's application for leave to appeal and specifically asked the parties to

> address whether the Court of Appeals erred when it determined that there are genuine issues of material fact as to (1) whether the plaintiff, a disappointed low bidder on a public contract, had a valid business expectancy and (2) whether the defendant architectural firm's communications, made pursuant to an agreement with the contracting

[1] According to defendant, its decision to recommend US Construction rather than plaintiff was predicated on the fact that the references supplied by plaintiff gave negative feedback and US Construction had provided construction services for other projects designed by defendant for the school district and had performed the work adequately. According to plaintiff, on the other hand, defendant's decision to recommend US Construction rather than plaintiff was based on defendant's desire "to punish [plaintiff] for what occurred on the Holly Academy project wherein [defendant] was ultimately replaced by another architect."

> school district, amounted to intentional and improper conduct sufficient to sustain a claim of tortious interference with a business expectancy. [*Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 489 Mich 953, 953-954 (2011).][2]

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

III. ANALYSIS

The elements of tortious interference with a business relationship or expectancy are " 'the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.' " *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). The issue here is whether plaintiff, as the lowest bidder on a public contract, had a valid business expectancy. In order to establish this, "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). We agree with the trial court and the Court of Appeals dissent that plaintiff did not have a valid business expectancy because plaintiff had no reasonable expectation of being awarded the contract, only "wishful thinking."

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[2] Because we conclude that plaintiff did not have a valid business expectancy, it is unnecessary for us to address the second issue.

That plaintiff as the lowest bidder on a public contract had no valid business expectancy is supported by the longstanding rule in Michigan that a disappointed low bidder on a public contract has no standing to sue in order to challenge the award of a contract to another bidder. *Detroit v Wayne Circuit Judge*, 128 Mich 438, 439; 87 NW 376 (1901) ("As a bidder, the complainant has no standing."). In *Talbot Paving Co v Detroit*, 109 Mich 657, 660, 662; 67 NW 979 (1896), this Court held that "the lowest bidder, under a contract proposed to be let by a municipal corporation, whose bid has been rejected, [does not have] a right of action at law to recover profits which he might have made had his bid been accepted." This Court reached this conclusion even though "under the charter of Detroit, it was the duty of the city to let the contract to the lowest responsible bidder . . . ." *Id*. at 660. This Court held that the charter did not provide for a private cause of action because it "was not passed for the benefit of the bidder, but as a protection to the public." *Id*. "The charter provision which required the acceptance of the lowest responsible bid had no reference to any interest which the bidders might have in the premises, but was passed to *protect the interest of the citizens* of the city." *Id.* at 662 (emphasis added); see also *Lasky v City of Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958) (stating that these provisions "are enacted for the benefit of property holders and taxpayers, and not for the benefit of or enrichment of bidders").

Given that a contractor that submits the lowest bid cannot bring a cause of action against the municipality when its bid is rejected, even when the municipality has adopted a charter provision that requires it to accept the "lowest responsible bidder," it is difficult to fathom how plaintiff's submission of the lowest bid could have created a valid business expectancy in light of the highly discretionary process of awarding governmental con-

tracts. In terms of whether a valid business expectancy is created, a plaintiff's expectations are entirely the same regardless of whether it alleges that the government has wrongfully denied it the contract or, as here, that a third party has interfered and caused a denial of the contract. In addition to the common-law rule, MCL 380.1267(6) expressly states that "[t]he board, intermediate school board, or board of directors may reject any or all bids . . . ." As the Court of Appeals dissent explained, "when the ultimate decision to enter into a business relationship is, by statute, a highly discretionary decision, a plaintiff cannot establish that its 'business expectancy' [reflected] a reasonable likelihood or possibility and not merely wishful thinking." *Cedroni*, 290 Mich App at 623 (K. F. KELLY, J., dissenting). In light of the common-law rule that a bidder that submits the lowest bid has no cause-of-action against the public entity that rejects this bid and the statutory provision that allows the school district to "reject any or all bids," MCL 380.1267(6), a bidder on a school construction project should know that its submission of the lowest bid does not create a reasonable probability that the school district will award it the contract. See *Lasky*, 352 Mich at 276 ("[O]ne making a bid or entering into a contract with a municipality, acts at his peril; he is supposed to know the law."); see also *EBI-Detroit, Inc v Detroit*, 279 Fed Appx 340, 352 (CA 6, 2008) ("Michigan courts have already rejected the idea that a disappointed bidder has a valid business expectancy in a potential government contract.").[3]

[3] The dissent argues that our decision to apply the "disappointed-bidder rule" to private entities is "contrary to the purpose of the disappointed-bidder rule: to protect taxpayers." *Post* at 63. However, if this case had anything at all to do with protecting taxpayers, plaintiff "should have proceeded by injunction to prevent the doing of the work under the [US Construction] contract" instead of "l[ying] by, and, after

In the instant case, not only should the common-law rule and MCL 380.1267(6) have made plaintiff aware that its submission of the lowest bid did not create a valid business expectancy, but documents provided by the school district before plaintiff even submitted its bid should also have made this perfectly clear. For example, both the advertisement for bids and the instructions to bidders included in the project manual expressly stated that the school district "reserves the right to accept or reject any or all offers." The school district's fiscal management policy also stated multiple times that the school district has the "right to reject any or all bids" and further stated that "the lowest dollar cost bidder may not always receive award of the bid." See *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), quoting 3 McQuillin, Municipal Corporations (2d ed), p 919 ("Reservation of right to reject any and all bids, where the authorities have power to make such reservation, gives the right to let the contract to any bidder and reject the others, although the one securing the contract is not the lowest bidder[.]"). Finally, Clay Perkins, the superintendent of the school district, averred by affidavit that "[w]hile [plaintiff] submitted

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the work had been done and paid for, ask for profits which it might have made if it had been permitted to perform its contract." *Talbot*, 109 Mich at 659. By adopting MCL 380.1267(6), which allows the school board to "reject any or all bids," the Legislature has determined that the school board is in the best position to "protect taxpayers," and "[t]he law does not give to courts the power to substitute their judgment for the honest judgment of the board." *Kundinger v City of Saginaw*, 132 Mich 395, 405; 93 NW 914 (1903). Finally, as we explain in footnote 8, we are not immunizing from liability a private entity that "acts with dishonesty and bad faith to interfere with the governmental entity's efforts," *post* at 64 n 2; instead, we are simply holding that when the ultimate decision to enter into a business relationship is a highly discretionary decision reposed by law within a governmental entity, a disappointed low bidder does not have a valid business expectancy for the purpose of sustaining a claim of tortious interference with a business expectancy.

the low bid, there was no communication of any intent to accept [plaintiff's] bid." That plaintiff did, in fact, understand that it might not be awarded the contract even though it was the lowest bidder is evidenced by a letter written by plaintiff's president, Richard Cedroni, to the school district, in which he stated:

> We are the apparent low bidders on the Additions and Renovations at Hill and Siple Elementary. I look forward to working with the Davison Schools on this project and I expect you will be more than pleased with my company's performance and professionalism, *if awarded*. [Emphasis added.]

The Court of Appeals recognized that "the submission of the lowest bid, in and of itself, was inadequate to sustain plaintiff's suit" and "reject[ed] any rule per se that would allow litigation to proceed simply on the basis of proof of the lowest bid" because submission of the lowest bid does not, by itself, create a valid business expectancy. *Cedroni*, 290 Mich App at 582.[4] However, the Court concluded that the school district's fiscal management policy, coupled with plaintiff's submission of the lowest bid, did create a valid business expectancy because the former stated that "[b]ids shall be awarded in compliance with applicable bidding obligations imposed by law to the 'lowest responsible bidder.' "

"Lowest responsible bidder" is defined in the policy as a "responsible contractor," and "responsible contrac-

[4] The dissent, on the other hand, concludes that "once a qualified bidder has submitted a conforming bid and knows that it has provided the lowest bid, there might be a genuine issue of material fact regarding whether the bidder's expectation reasonably elevated from a 'mere hope' to a 'realistic expectation' that it would be awarded the project . . . ." *Post* at 59. This conclusion is simply incompatible with both MCL 380.1267(6), which expressly states that the school board "may reject any or all bids," and the documents presented to plaintiff, which equally clearly state that "the lowest dollar cost bidder may not always receive award of the bid."

tor" is defined as a "contractor determined by the [school district] to be sufficiently qualified to satisfactorily perform the Construction Project . . . ." The policy then provides a list of factors for the school district to consider in determining whether a contractor is properly characterized as a "responsible contractor," including "an overall review of the Responsibility Criteria," "the input of the District's architect(s)," and "other relevant factors." The "responsibility criteria" include numerous considerations such as "projects completed within the past three (3) years"; "experience with construction techniques, trade standards, project scheduling, cost control, management of projects and building codes, particular to the Construction Project"; "[r]eferences from individuals or entities that have received in the past three (3) years, or that are currently receiving the contractor's services, including information regarding records of performance, job site cooperation, and long term quality standards"; and "any additional criteria that [the school district] may deem relevant for purposes of making a determination of contractor responsibility . . . ."

In *Mago Constr Co v Anderson, Eckstein & Westrick, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 183479), a case involving facts similar to the instant case, the Court of Appeals affirmed the trial court's order granting the defendant's motion for summary disposition. The defendant was a corporation of professional consulting engineers and the plaintiff was the disappointed lowest bidder. The plaintiff sued the defendant for, among other things, tortious interference with a business expectancy. The Court of Appeals explained, "Where the ultimate decision to enter into a business relationship is a highly discretionary decision reposed within the structure of a governmental entity, it be-

comes more difficult for a plaintiff to prove that it had an expectancy of doing business with the governmental body." *Mago*, unpub op at 3. The Court of Appeals concluded that the plaintiff had no valid business expectancy because

> the award of the contract was a highly discretionary governmental activity in which "too many factors [were] in play to be able to reasonably infer that . . . plaintiff would have obtained the desired [contract]." Moreover, the bidding instructions clearly informed plaintiff that the lowest bidder was not guaranteed to receive the water main improvement contract. [*Id.* (citation omitted; first alteration in the original).]

Although *Mago* is an unpublished and therefore nonbinding opinion of the Court of Appeals,[5] and, as the dissent points out, the facts in *Mago* are not identical to those in the instant case, we nevertheless find its reasoning persuasive.

In the instant case, although the school district's fiscal management policy provided that the contract would be awarded to the "lowest responsible bidder," the school district itself retained the right to choose the "lowest responsible bidder." The policy provided a nonexhaustive list of factors for the school district to consider, including its architect's input. Therefore, just as in *Mago*, "the award of the contract was a highly discretionary governmental activity in which 'too many factors [were] in play to be able to reasonably infer that . . . plaintiff [by virtue alone of being the lowest bidder] would have obtained the desired [contract].' " *Id.* (citation omitted; first alteration in the original). In addition, "the bidding instructions clearly informed plaintiff that the lowest bidder was not guaranteed to

[5] MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis.").

receive the . . . contract." *Id.* Because the school district retained a broad discretionary right to reject the lowest bidder, plaintiff could not have had a valid business expectancy.[6] See also *Talbot*, 109 Mich 657, and *Leavy*, 247 Mich 447, both of which involved city charters that contained the same "lowest responsible bidder" requirement and yet this Court held that the lowest bidder could not sue on the basis of not being awarded the contract. See also *EBI-Detroit, Inc*, 279 Fed Appx at 343, 353, in which, although the city of Detroit "made it clear that the Belle Isle Project would be awarded to the lowest bidder who was both responsive and responsible," the United States Court of Appeals for the Sixth Circuit held, in an unpublished and nonbinding opinion, that the plaintiff, who was the lowest responsive bidder, "had a 'unilateral hope' of winning the contract, nothing more, so its tortious interference claim cannot proceed." (Citation omitted; emphasis omitted.)

We agree with the Court of Appeals dissent that the school district's fiscal management policy did not afford plaintiff a valid business expectancy. The school district determined that plaintiff was not a "responsible contractor" in this specific circumstance, and it is not our

[6] The Court of Appeals majority relied, as does the dissent in this Court, on *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615; 329 NW2d 760 (1982), to support its holding that a genuine issue of material fact exists regarding whether plaintiff had a valid business expectancy. However, given that *Joba* "never explained the nature of the evidence presented [in that case] that gave rise to a legitimate business expectancy," we do not find *Joba* to be a particularly helpful decision. *Cedroni*, 290 Mich App at 626 (K. F. KELLY, J., dissenting). Moreover, "[t]his Court, of course, is not bound by Court of Appeals decisions." *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). Contrary to the dissent's assertion, we do not reject *Joba* simply because it is not binding authority. See *post* at 62 n 1. Rather, we reject *Joba*, and adopt *Mago*, because we find the analysis of *Mago* to be more persuasive than that of *Joba*.

job to second-guess this determination. See *Kundinger v City of Saginaw*, 132 Mich 395, 405; 93 NW 914 (1903) ("The law does not give to courts the power to substitute their judgment for the honest judgment of the board."); *Warda v Flushing City Council*, 472 Mich 326, 333; 696 NW2d 671 (2005) ("Whether the council acted wisely or unwisely, prudently or imprudently, is not for the consideration or determination of this Court."); *Leavy*, 247 Mich at 450, quoting 3 McQuillin, § 1340 (" 'The court will indulge the presumption that the authorities acted in good faith in awarding the contract.' ").

" 'The exercise of discretion to accept or reject bids [involving public contracts] will only be controlled by the courts when necessary to prevent fraud, injustice or the violation of a trust.' " *Leavy*, 247 Mich at 450, quoting 3 McQuillin, § 1340. In this case, there is no evidence that this Court's intervention is "necessary to prevent fraud, injustice or the violation of a trust." Rather, as the Court of Appeals dissent explained, plaintiff "is simply attempting to substitute [its] own judgment for that of the school district," and "[w]hile plaintiff may believe its . . . judgment to be superior to that of the school board, the statute endows the school board, not plaintiff, with the discretion to award contracts in the school board's best interest." *Cedroni*, 290 Mich App at 625 (K. F. KELLY, J., dissenting).[7] Because plaintiff had no valid business expectancy, and because there is no evidence that this Court's involvement is

[7] The dissent states that "plaintiff presented evidence that defendant's opinion and recommendation regarding plaintiff's qualifications might have been improperly influenced by misplaced or unsupported animosity toward plaintiff related to problems between plaintiff and defendant on a previous project." *Post* at 59. However, the only "evidence" that plaintiff has presented to support its allegation that defendant "improperly influenced" the school district are plaintiff's own statements.

"necessary to prevent fraud, injustice or the violation of a trust," plaintiff's claim of tortious interference with a business expectancy must fail as a matter of law.[8]

IV. CONCLUSION

For these reasons, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting defendant's motion for summary disposition. As the trial court and the Court of Appeals dissent concluded, plaintiff had no valid business expectancy for the purposes of sustaining a claim of tortious interference with a business expectancy.

YOUNG, C.J., and MARY BETH KELLY and ZAHRA, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). The issue presented in this case is whether plaintiff has produced sufficient evidence to create a genuine issue of material fact regarding whether defendant tortiously interfered with plaintiff's valid business expectancy. I respectfully dissent from the majority's decision to disregard *Joba Constr Co, Inc v Burns & Roe Inc*, 121 Mich App 615; 329 NW2d 760 (1982). Instead, I would apply *Joba* and affirm the judgment of the Court of Appeals because I

[8] Plaintiff argues that an architect should not be immune from liability for making false statements about a low bidder. Similarly, the dissent argues that this Court should "not protect a *private* entity that dishonestly influences the governmental entity." *Post* at 65. However, we do not hold that an architect is "immune from liability" for making false statements about a low bidder. Instead, we simply hold that when the ultimate decision to enter into a business relationship is a highly discretionary decision reposed by law within a public entity, a disappointed low bidder does not have a valid business expectancy for the purpose of sustaining a claim of tortious interference with a business expectancy.

do not believe the "disappointed bidder" rule should be extended to the facts of this case.

I. FACTS AND PROCEDURAL HISTORY

In 2003, Davison Community Schools decided to renovate two elementary schools and contracted with defendant for architectural and engineering services. Under the contract, defendant was to assist the school district during the competitive bidding process "by reviewing and evaluating bid applications, investigating competing contractors and their references, expressing opinions and views on contractor competence and workmanship, and making recommendations regarding which contractor should be awarded the project." *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 290 Mich App 577, 583; 802 NW2d 682 (2010). Jackie Hoist was defendant's designated representative for the project.

The school district advertised for bids. With respect to the bidding process, the school district's fiscal management policy (FMP) provided that the school district reserved the right to reject any or all bids. The FMP also stated that "[b]ids shall be awarded in compliance with the applicable bidding obligations imposed by law to the 'lowest responsible bidder.' " The FMP defined "lowest responsible bidder" as

> [t]he Responsible Contractor that has submitted a fully complete and responsive bid that provides the lowest net dollar cost for all labor and materials required for the complete performance of the work of the Construction Project let for bid. Such bid must satisfy the requirements of all applicable local, state, and federal laws, this Policy, any administrative rules associated with this Policy developed by the Superintendent at the Board's direction, and bid documents used to solicit bids, and any other guidelines and specifications required for the Construction Project.

> Because a bidder with the net lowest dollar cost bid may not be a Responsible Contractor, the lowest dollar cost bidder may not always receive award of the bid.

The FMP defines the "Responsible Contractor" as

> [a] contractor determined by the Board to be sufficiently qualified to satisfactorily perform the Construction Project, in accordance with all applicable contractual and legal requirements. The Board's determination shall be based upon: (1) an overall review of the Responsibility Criteria listed below and the contractor's responses, or failure to respond, to same; (2) the contractor's compliance with this Policy and all applicable local, state and federal laws; (3) the input of the District's architect(s) [here defendant] and/or construction manager(s), if any; (4) review of the contractor's proposed subcontractors; and (5) other relevant factors particular to the Construction Project.

It is undisputed that plaintiff was the lowest bidder, having submitted a bid that was $50,000 less than the next-lowest bid, and plaintiff was aware that it had provided the lowest bid. However, Hoist sent a letter to the school district recommending that the district not accept plaintiff's bid and instead accept the bid of the next-lowest bidder, US Construction and Design Services, LLC. Hoist's notes indicated that while several references provided positive reviews of plaintiff's work, other references provided negative feedback and that Hoist had had personal negative experiences with plaintiff on a previous project. Plaintiff alleges that Hoist's notes regarding various references' comments were untrue. Additionally, plaintiff alleges that defendant's recommendation that the school district reject plaintiff's bid was born out of a desire to punish plaintiff for a dispute between defendant and plaintiff on the previous "Holly Academy project" that resulted in defendant's discharge from that project. The record also

includes an affidavit and letter from plaintiff's president, Richard Cedroni, challenging the negative opinions in Hoist's notes and stating that plaintiff had never been removed from a project or received a poor review in the past.

The school board's review committee endorsed defendant's recommendation to reject plaintiff's bid, and the school district awarded the project to US Construction, explaining that its decision was made in reliance on defendant's recommendation.

Plaintiff filed a complaint against defendant alleging tortious interference with prospective economic relations, arguing that it had "a legitimate expectancy in obtaining a contract to complete work for the [school] Project," that defendant had "wrongfully persuaded the School District" to reject plaintiff's bid, and that defendant had "intentionally interfered with the expectant business relationship . . . by wrongfully claiming that [plaintiff] was unqualified to perform" the necessary work. Defendant moved for summary disposition, which was eventually granted under MCR 2.116(C)(10).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmoving party, show that there is no genuine issue with respect to any material fact. *Quinto*

v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). The trial court's task in reviewing the motion entails consideration of the record evidence and all reasonable inferences arising from that evidence. *Skinner*, 445 Mich at 161.

III. ANALYSIS

The elements for a claim of tortious interference with advantageous business relationships or prospective economic relations are

> (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference causing a breach or termination of the relationship or expectancy; and (4) resulting damage to the party whose relationship or expectancy has been disrupted. [*Joba*, 121 Mich App at 634.]

At issue in this case is whether plaintiff had a "valid business expectancy." To avoid summary disposition, a plaintiff must assert "a *specific* and *reasonable* prospective economic advantage that was interfered with." *Id.* The business expectation must be proved "with some degree of specificity" so that it is a "realistic expectation and not merely wishful thinking," "mere hope," or "the innate optimism of the salesman." *Id.* at 634-635 (quotation marks and citations omitted). However, a plaintiff "need not demonstrate a guaranteed relationship" given the prospective nature of the expectation at issue. *Id.* at 635 (quotation marks and citations omitted); see, also, *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

Although it is generally difficult to claim that a bid—which, at its heart is an offer to perform the work for a specified price—can generate a realistic expectation in the bidder that it will be awarded the project,

plaintiff did not merely submit a bid in this case. Rather, plaintiff was informed that it was the lowest bidder. In my view, once a qualified bidder has submitted a conforming bid and knows that it has provided the lowest bid, there might be a genuine issue of material fact regarding whether the bidder's expectation reasonably elevated from a "mere hope" to a "realistic expectation" that it would be awarded the project, *especially* in this case, given that the bidding materials provided by the school district stated that the project "shall" be awarded to the "lowest responsible bidder." See *Joba*, 121 Mich App at 635 (concluding that "the lowest qualified bidder" has a "legitimate expectancy in obtaining the contracts").

Accordingly, given that plaintiff was aware of its status as the lowest bidder, and keeping in mind that plaintiff "need not demonstrate a guaranteed relationship," *id.* (quotation marks and citations omitted), I believe that plaintiff might have had a valid business expectation as long as plaintiff was able to establish a genuine issue of material fact regarding whether it was a responsible bidder.

Although defendant's investigation and opinion of plaintiff's qualifications are certainly valid considerations in determining whether plaintiff was a responsible bidder, the parties presented conflicting evidence regarding plaintiff's qualifications. While I do not think that the mere fact that plaintiff believed that it was qualified is sufficient to avoid summary disposition on this issue, plaintiff presented evidence that defendant's opinion and recommendation regarding plaintiff's qualifications might have been improperly influenced by misplaced or unsupported animosity toward plaintiff related to problems between plaintiff and defendant on a previous project. Plaintiff's evidence included Hoist's

allegedly untrue notes regarding plaintiff's qualifications, which included reviews from individuals who had previously worked with plaintiff, and Richard Cedroni's affidavit and letter showing that plaintiff had never been removed from a project or received a poor review in the past. This evidence establishes that plaintiff had a realistic expectation that it would qualify as a responsible bidder. This conclusion, in turn, gives rise to a question of material fact about whether plaintiff had a valid business expectancy in being awarded the contract. Thus, because the evidence must be viewed in the light most favorable to plaintiff as the nonmoving party, and because determining whether plaintiff was "qualified" or "responsible" is largely a question of fact on which both parties have presented conflicting evidence, I would affirm the judgment of the Court of Appeals.

As the majority notes, however, a specific line of cases beginning with *Talbot Paving Co v Detroit*, 109 Mich 657; 67 NW 979 (1896), generally hold that a disappointed bidder on a public contract does not have a cause of action regardless of the bidder's qualifications or the value of the bid offered. See, also, *Kundinger v City of Saginaw*, 132 Mich 395, 405; 93 NW 914 (1903) (stating that courts cannot "substitute their judgment for the honest judgment of the [governmental entity]"). Generally, the theory supporting this rule is that competitive bidding is designed to benefit the taxpayers rather than the bidders. See *Lasky v City of Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958).

Notably, however, the "disappointed bidder" rule developed by this line of cases has generally been applied only when the plaintiff files suit against the contracting governmental entity rather than another private entity. Indeed, in *Joba*, 121 Mich App 615, the Court of Appeals did not apply the disappointed-bidder

rule in a dispute between two private entities under circumstances very similar to this case.

In *Joba*, the plaintiff was the lowest bidder for a contract with the city of Detroit. The defendant had been retained by the city to evaluate bids and make recommendations regarding which bidders to select for certain contracts, including the contract on which the plaintiff was the lowest bidder. The defendant recommended that the city not accept the plaintiff's bid because, in the defendant's opinion, the plaintiff was unqualified to perform the contract. However, just as in this case, there was also evidence presented that animosity existed between the defendant and the plaintiff, partially resulting from past interaction on a different project. The case went to trial, the jury returned a verdict in favor of the plaintiff, and the defendant sought a directed verdict, which the trial court denied. Accordingly, the *Joba* Court considered the defendant's appeal of the trial court's denial of a directed verdict in the light most favorable to the plaintiff as the nonmoving party, and it concluded that the "plaintiff presented sufficient evidence to create a question of fact as to whether it was the lowest qualified bidder and thus had a legitimate expectancy in obtaining the contracts . . . ." *Id.* at 635. As previously stated, *Joba* did not apply the disappointed-bidder rule to the dispute between the two *private* entities.

The majority, however, summarily discards *Joba* as not "particularly helpful," *ante* at 52 n 6, and instead relies on *Mago Constr Co v Anderson, Eckstein & Westrick, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 183479), to support its argument that the disappointed-bidder rule should apply in this case. *Mago*, however, is unpersuasive for a variety of reasons. First, to the

extent that *Mago* is inconsistent with *Joba*, *Joba* should be given greater weight because, as the majority concedes, "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).[1] Second, regardless of the relative precedential value of the two opinions, *Mago* is distinguishable on its facts because, unlike plaintiff in this case, the plaintiff in *Mago* submitted a *nonconforming bid*. Accordingly, *Mago* held that "the fact that plaintiff submitted a nonconforming bid should have negated any expectation that it might have had regarding the possibility of receiving the contract." *Mago*, unpub op at 3.

Likewise, the majority's reliance on an unpublished opinion of the United States Court of Appeals for the Sixth Circuit, *EBI-Detroit, Inc v Detroit*, 279 Fed Appx 340 (CA 6, 2008), in support of its extension of the disappointed-bidder rule to a dispute between two private entities is misplaced. Specifically, *EBI-Detroit*, 279 Fed Appx at 352-353, cited *Timmons v Bone*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 228942), p 2, which had rejected a tortious-interference claim because the

[1] I recognize that, under MCR 7.215(J), the Court of Appeals was not bound to follow *Joba*, because *Joba* was issued before November 1, 1990. However, when faced with two nonbinding opinions reaching different results on the same issue, the Court of Appeals properly gave more weight to the published opinion. Moreover, *Mago* is distinguishable from this case for the reasons discussed later in this opinion. Finally, the majority's decision to reject *Joba* in part because this Court is not bound by the Court of Appeals' opinions, see *ante* at 52 n 6, citing *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004), is perplexing given the majority's reliance on a single unpersuasive and unpublished Court of Appeals opinion to extend the disappointed-bidder rule beyond its traditional scope. The majority's conclusion that *Mago* is more persuasive than *Joba* is equally perplexing, given that *Joba* is exactly on point and consistent with the traditional scope of the disappointed-bidder rule, while *Mago* is entirely distinguishable for the reasons discussed later in this opinion.

plaintiff "did not meet the minimum qualifications for obtaining the . . . contract . . . ." Accordingly, all the cases cited by the majority in support of its decision to extend the disappointed-bidder rule are both unpublished and distinguishable because the plaintiffs in those cases failed to satisfy the requirements for submitting a conforming bid. While I agree that submission of a nonconforming bid might be insufficient, as a matter of law, to create a valid business expectancy for purposes of a claim of tortious interference, there is nothing in the record indicating that plaintiff's bid in this case was nonconforming. Accordingly, the majority's position is without support in the caselaw. The Court of Appeals' opinion in this case, however, is fully supported by the directly applicable opinion in *Joba*.

Furthermore, unlike the majority's holding in this case, *Joba*'s decision to limit the disappointed-bidder rule to suits against governmental entities is consistent with the purpose of that rule. Specifically, by declining to provide private entities with the same protection from suit granted to governmental entities, *Joba* ensures that taxpayers obtain the best price possible for public contracts, free of improper interference by private entities. As evidenced by the facts of *Joba* and, potentially, the facts of this case, private entities may be motivated to make contracting decisions for reasons that are not consistent with the purpose of competitive bidding for government contracts. Because these potential motivations may not result in the selection of the "lowest responsible bidder," they are contrary to the purpose of the disappointed-bidder rule: to protect taxpayers.[2]

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[2] The majority misconstrues my discussion of the purpose of the disappointed-bidder rule. See *ante* at 47-48 n 3. As stated previously, in my view the disappointed-bidder rule should not be extended to protect

Finally, this Court's opinions establishing the disappointed-bidder rule do not mandate the majority's result. To begin with, the rule should not apply to protect private entities for the reasons previously discussed. Moreover, in *Kundinger*, 132 Mich at 405, this Court explained that courts cannot "substitute their judgment for the *honest judgment* of the [governmental entity]." (Emphasis added.) Similarly, in *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), quoting 3 McQuillin, Municipal Corporations (2d ed), § 1340, this Court stated that " '[t]he court will indulge the presumption that the authorities *acted in good faith* in awarding the contract.' " (Emphasis added.) Accordingly, the disappointed-bidder rule is premised on a governmental entity's ability to exercise "honest" and "good faith" discretion.[3]

However, when a private entity intentionally provides inaccurate or misleading information to a governmental entity and the governmental entity in turn relies on that information in making a contracting

private entities and, thus, should not apply in this case. I merely discuss the purpose of the disappointed-bidder rule to show that, by extending the rule's protections beyond governmental entities, the majority's holding is contrary to the purpose of the very rule that it applies. Stated differently, the purpose underlying competitive bidding on public contracts and the disappointed-bidder rule is to ensure that taxpayers obtain the best possible price from a qualified contractor. I agree with the majority that the Legislature has determined that the governmental entity is generally in the best position to carry out that purpose. However, the governmental entity is deprived of its ability to carry out that purpose when a private entity, such as defendant in this case, allegedly acts with dishonesty and bad faith to interfere with the governmental entity's efforts.

[3] Plaintiff's letter to the school board, which the majority cites, see *ante* at 49, merely recognizes the *school district's* discretion in selecting a bidder. The letter cannot be reasonably interpreted as implying that plaintiff consented to defendant's alleged efforts to *improperly influence* the school district's exercise of that discretion.

decision, the private entity has injected dishonesty and bad faith into the decision-making process. Accordingly, the bidding process results in an "injustice," and courts may intervene without impermissibly interfering with the governmental entity's exercise of discretion in making contracting decisions. See *Leavy*, 247 Mich at 450 (stating that courts may intervene in the public bidding process to prevent an "injustice") (quotation marks and citation omitted). Stated more simply, if plaintiff had lost the contract in this case solely because the school district had exercised its discretion free of improper influence and selected a bidder other than plaintiff, I would agree that plaintiff has no claim. However, because plaintiff has established a genuine issue of material fact in regard to whether it lost the contract because *defendant* acted dishonestly and in bad faith by improperly interfering with the school district's decision, I believe that plaintiff may have a valid claim for tortious interference under *Joba*.[4] Thus, in my view, defendant is not entitled to summary disposition.

Accordingly, although a *governmental* entity is entitled to deference regarding its discretionary selection of a bidder under this Court's jurisprudence, that caselaw does not protect a *private* entity that dishonestly influences the governmental entity. All the various documents and statutes that the majority cites to establish the fact that the school district in this case had the authority to reject any and all bids are rooted in deference to the school district's discretion in making contracting decisions. However, this case raises the

[4] Even the Court of Appeals dissent in this case recognized that "a plaintiff does have a legitimate expectancy that the bid it submits will be evaluated *fairly* and openly and will be subject to the same or similar scrutiny as other bids, so that the plaintiff's bid stands on an even playing field with all other bids." *Cedroni*, 290 Mich App at 623 (K. F. KELLY, J., dissenting) (emphasis added).

separate issue of whether the deference afforded to governmental entities should be extended to protect private entities, even when the private entity dishonestly influences the governmental entity's discretion. Moreover, because this case is at the summary disposition stage, we must view the evidence in the light most favorable to plaintiff as the nonmoving party. Doing so, I believe that plaintiff has presented sufficient evidence to create a genuine issue of material fact regarding whether plaintiff met the definition of "lowest responsible bidder" as well as whether defendant's recommendation to the school district was the result of a personal vendetta against plaintiff. Thus, because *Joba* is the most relevant published opinion, and *Joba*'s 30-year-old holding is consistent with the purpose of the disappointed-bidder rule, I would apply *Joba* and affirm the judgment of the Court of Appeals.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

PEOPLE v RAPP

Docket Nos. 143343 and 143344. Argued April 4, 2012 (Calendar No. 4). Decided July 27, 2012.

Jared Rapp was charged in the 54-B District Court, David L. Jordan, J., with violating Michigan State University (MSU) Ordinance, § 15.05, a misdemeanor, which prohibits a person from disrupting the normal activity of any person, firm, or agency that is carrying out service, activity, or an agreement for or with MSU. The jury convicted defendant, and he appealed his conviction in the Ingham Circuit Court, Paula J. M. Manderfield, J., which reversed his conviction with prejudice. The circuit court relied on *City of Houston, Texas v Hill*, 482 US 451 (1987), and determined that the challenged ordinance was unconstitutional because it was facially overbroad. The Court of Appeals granted the prosecution leave to appeal (Docket No. 294630). The circuit court later granted defendant's motion to tax costs pursuant to MCR 7.101(O). The Court of Appeals granted the prosecution leave to appeal that decision as well (Docket No. 295834), and consolidated the appeals. The Court of Appeals, SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ., reversed the decisions of the circuit court, concluding that the ordinance was not facially overbroad and that the assessment of costs was not appropriate, and remanded the case to the circuit court to permit that court to address defendant's other claims of error. 293 Mich App 159 (2011). The Supreme Court granted defendant leave to appeal. 490 Mich 927 (2011).

In an opinion by Justice HATHAWAY, joined by Chief Justice YOUNG and Justices CAVANAGH, MARILYN KELLY, and MARY BETH KELLY, the Supreme Court *held*:

The language in MSU Ordinance, § 15.05 making it an offense to disrupt the normal activity of a protected person was facially overbroad because it substantially infringed on First Amendment rights. MCR 7.101(O) does not permit the taxation of costs in criminal appeals.

1. Statutes that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application. The overbreadth must be substantial not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

2. In *Hill*, the United States Supreme Court concluded that an ordinance that made it unlawful to in any manner oppose, molest, abuse, or interrupt a police officer was facially overbroad because it criminalized a substantial amount of protected speech and accorded the police unconstitutional discretion in enforcement. Similar to the ordinance at issue in *Hill*, the plain language of the MSU ordinance criminalized verbal disruptions, and its application was not limited to those verbal disruptions that contained fighting words or obscene language. The MSU ordinance could have been violated numerous times throughout any given day because there are seemingly infinite ways in which someone might disrupt another person who is engaged in an activity for or with MSU. As in *Hill*, the MSU ordinance also provided the police with unfettered discretion to arrest individuals for words or conduct that annoyed or offended the police.

3. The Court of Appeals erred when it attempted to distinguish *Hill* because the ordinance in that case used the word "interrupt," while the MSU ordinance used the word "disrupt." Dictionaries commonly include "interrupt" in the definition of "disrupt," and the words are often used as synonyms. Under the definition used by the Court of Appeals, a person can disrupt another person by either (1) interrupting that person or (2) causing disorder or confusion. Under the first definition, a person can disrupt someone by interrupting them. A person can similarly cause disorder or confusion through purely expressive conduct. Accordingly, under either definition, the MSU ordinance reached and criminalized a substantial amount of constitutionally protected speech and conduct, and the language in MSU Ordinance, § 15.05 making it an offense to disrupt the normal activity of a protected person was facially unconstitutional.

4. MCR 7.101(O) permits a prevailing party to tax the reasonable costs of an appeal in the circuit court as provided in MCR 2.625. MCR 2.625 is a rule of civil procedure that does not apply to criminal matters. MCR 7.101(O) also refers to MCL 600.2441, a statute that only applies to the taxation of costs in civil matters. Accordingly, MCR 7.101(O) does not provide grounds for the taxation of costs in a criminal matter, and the Court of Appeals correctly concluded that the assessment of costs against the prosecution in this case was improper.

Reversed in part and affirmed in part; circuit court decision holding that MSU Ordinance, § 15.05 was facially overbroad reinstated to the extent that the ordinance made it an offense to "disrupt the normal activity" of a protected person; Court of Appeals' judgment reversing the assessment of costs affirmed.

Justice ZAHRA, joined by Justice MARKMAN, dissenting, disagreed that the language in the ordinance making it an offense to disrupt the normal activity of a protected person was unconstitutional under *Hill*. *Hill* did not provide sufficient grounds to conclude that the ordinance reached a substantial amount of constitutionally protected expression relative to its plainly legitimate sweep given that the MSU ordinance applied more narrowly than the Houston ordinance. The ordinance at issue in *Hill* was distinguishable because it involved the term "interrupt" rather than "disrupt." While all disruptions may be considered interruptions, not all interruptions rise to the level of disruptions. The former term typically carries a verbal connotation, while the latter suggests not merely a verbal interjection but an actual and severe impediment to the carrying out of one's activities. The language in the MSU ordinance was concerned with allowing legitimate activities on campus to go unimpeded. Defendant also failed to demonstrate a realistic danger that the ordinance significantly compromised First Amendment freedoms because he failed to present evidence that MSU's application of the ordinance prohibited protected expression. The majority also failed to consider the fact that the ordinance was adopted by an institution of higher education and that a university may implement measures to prevent disruptions of the academic environment. Justice ZAHRA would have affirmed the judgment of the Court of Appeals and remanded the case to the circuit court for consideration of defendant's challenge to the ordinance as it was applied to him.

1. CONSTITUTIONAL LAW — FIRST AMENDMENT — OVERBREADTH — FACIAL UNCONSTITUTIONALITY — CRIMINAL LAW — DISRUPTING THE NORMAL ACTIVITY OF A PROTECTED PERSON.

Statutes that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application; to be unconstitutional, the overbreadth must be substantial not only in an absolute sense, but also relative to the statute's plainly legitimate sweep; an ordinance that prohibits a person from disrupting the normal activity of any person, firm, or agency that is carrying out service, activity, or an agreement for or with the entity that enacted the ordinance criminalizes a substantial amount of constitutionally protected conduct and, thus, is facially overbroad and unconstitutional (US Const, Am I).

2. COSTS — APPEAL — CIRCUIT COURT — CRIMINAL CASES.

A prevailing party may tax the reasonable costs incurred in an appeal in the circuit court, including (1) the cost of an appeal or stay bond, (2) the transcript, (3) documents required for the record on appeal, (4) fees paid to the clerk or the trial court clerk incident to the appeal,

(5) taxable costs allowed by law in appeals in the Supreme Court, and (6) other expenses taxable under applicable court rules or statutes, but costs are only taxable in civil, rather than criminal, matters (MCL 600.2441[2]; MCR 2.625, MCR 7.101[O]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Assistant Prosecuting Attorney, for the people.

J. Nicholas Bostic for defendant.

Amicus Curiae:

Michael J. Kiley for the Michigan State University Board of Trustees.

HATHAWAY, J. At issue in this case is whether Michigan State University (MSU) Ordinance, § 15.05 is facially unconstitutional. The Court of Appeals reversed the circuit court's conclusion that the ordinance is unconstitutional under *City of Houston, Texas v Hill*, 482 US 451; 107 S Ct 2502; 96 L Ed 2d 398 (1987).[1] Because we agree with the circuit court's analysis and conclude that the language in the ordinance making it an offense to "disrupt the normal activity" of a protected person is facially overbroad, as articulated by the United States Supreme Court in *Hill*, we reverse the portion of the Court of Appeals' judgment pertaining to the constitutionality of MSU Ordinance, § 15.05, and we reinstate the circuit court's decision with regard to this issue to the extent that the circuit court held that the quoted language is facially unconstitutional.

Also at issue is whether MCR 7.101(O) provides for taxation of costs in criminal cases. The Court of Appeals held that costs may not be assessed under MCR 7.101(O)

[1] *People v Rapp*, 293 Mich App 159; 809 NW2d 665 (2011).

in criminal matters.[2] We agree with the Court of Appeals and, therefore, affirm that portion of its judgment.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a parking citation that defendant received when his car was parked in an MSU parking structure. On the day the citation was issued, MSU parking enforcement employee Ricardo Rego was working on campus. Defendant confronted Rego and asked if Rego was the one who had issued the citation. Defendant was shouting, which led Rego to believe that defendant was acting aggressively. Rego got into his service vehicle and called the campus police.[3] Approximately 10 to 15 minutes passed before the police arrived. During that time, Rego sat in his service vehicle and completed the process for having an adjacent vehicle towed, while defendant stood outside the service vehicle and took pictures of Rego with a camera phone.

Defendant was charged with the misdemeanor offense of violating MSU Ordinance, § 15.05.[4] A district court jury convicted defendant of violating the ordinance. On appeal, the circuit court reversed the conviction on the basis that the ordinance was unconstitutionally overbroad on its face. The circuit court also granted defendant's motion brought pursuant to MCR 7.101(O) to tax costs against the prosecution.

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[2] *Id*. at 167.

[3] Rego testified that this was standard procedure when a person is upset about a parking citation.

[4] MSU Ordinance, § 15.05 provides:

> No person shall disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University.

The Court of Appeals reversed the circuit court's decision and held that the ordinance is not facially overbroad, and defendant is not entitled to costs.[5] This Court granted defendant's application for leave to appeal and asked the parties to address "(1) whether Michigan State University Ordinance 15.05 is facially unconstitutional under *City of Houston v Hill*, 482 US 451 (1987), and (2) whether MCR 7.101(O) allows taxation of costs in criminal cases appealed in the circuit court."[6]

II. STANDARD OF REVIEW

This Court reviews de novo questions of constitutional law.[7] This Court presumes that ordinances are constitutional, and the party challenging the validity of the ordinance has the burden of proving a constitutional violation.[8]

III. ANALYSIS

We first address whether MSU Ordinance, § 15.05 is facially unconstitutional.[9] When considering a "facial" challenge to the breadth of a law on First Amendment grounds,[10] this Court considers "not merely the spo-

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[5] *Rapp*, 293 Mich App at 160, 167. The Court of Appeals did not rule on whether the ordinance is unconstitutional as applied to the facts of this case and, instead, remanded this matter to the circuit for resolution of that issue.

[6] *People v Rapp*, 490 Mich 927 (2011).

[7] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[8] *Fass v Highland Park (On Rehearing)*, 321 Mich 156, 161; 32 NW2d 375 (1948); *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

[9] We recognize that a facial constitutional challenge is difficult to mount. See *Broadrick v Oklahoma*, 413 US 601, 615-616; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

[10] "The First Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment, provides that the government 'shall make no law . . . abridging the freedom of speech.' "

radic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."[11]

Before ruling that a law is unconstitutionally overbroad, this Court must determine whether the law "reaches a substantial amount of constitutionally protected conduct."[12] The United States Supreme Court has held that criminal statutes must be scrutinized with particular care,[13] and those that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application.[14] However, "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects."[15] Thus, a statute's overbreadth must "be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[16]

In *Hill*, the United State Supreme Court considered the constitutionality of an ordinance that made it

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Rochester Hills v Schultz, 459 Mich 486, 489; 592 NW2d 69 (1999), quoting US Const, Am 1. This Court has recognized that a party may challenge the "breadth" of "a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000).

[11] *Thornhill v Alabama*, 310 US 88, 97; 60 S Ct 736; 84 L Ed 1093 (1940).

[12] *Village of Hoffman Estates v The Flipside, Hoffman Estates, Inc*, 455 US 489, 494; 102 S Ct 1186; 71 L Ed 2d 362 (1982).

[13] *Winters v New York*, 333 US 507, 515; 68 S Ct 665; 92 L Ed 840 (1948).

[14] *Hill*, 482 US at 458-459, citing *Kolender v Lawson*, 461 US 352, 359 n 8; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

[15] *United States v Williams*, 553 US 285, 292; 128 S Ct 1830; 170 L Ed 2d 650 (2008).

[16] *Id.*

unlawful to "in any manner oppose, molest, abuse or interrupt" a police officer.[17] The Court concluded at the outset that this language prohibited verbal interruptions and, therefore, implicated constitutionally protected speech under the First Amendment.[18] The Court first noted that the ordinance was not limited in any way to fighting words or obscene language.[19] Instead, the ordinance imposed a blanket prohibition on speech that interrupts an officer in any manner.[20] Expressly clarifying that the Constitution prohibits making such speech a crime, the Court explained that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[21] While the Court acknowledged the difficulty of drafting precise laws, it reiterated that it would invalidate those laws "that provide the police with unfettered discretion to arrest individuals for *words or conduct* that annoy or offend them."[22]

Hill also stated that as the Court had "observed over a century ago, '[i]t would certainly be dangerous if the legislature could set a net large enough to catch all

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[17] *Hill*, 482 US at 455. The full text of the ordinance in *Hill* made it "unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." *Id*. However, only the portion of the ordinance making it unlawful to "oppose, molest, abuse or interrupt" an officer was enforceable because the remaining language making it unlawful to "assault" or "strike" a police officer was preempted by the Texas Penal Code. *Id*. at 460.

[18] *Id*. at 461.

[19] *Id*. at 462.

[20] *Id*.

[21] *Id*. at 462-463.

[22] *Id*. at 465 (emphasis added).

possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' "[23] The Court noted that the ordinance's plain language prohibiting opposing, molesting, abusing, or interrupting a police officer in any manner could be violated on numerous occasions every day.[24] Nevertheless, only those individuals that the police chose to arrest would be charged with violating the ordinance.[25] *Hill* concluded that because the "ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement," it was substantially overbroad and facially invalid.[26]

In this case, we address the constitutionality of MSU Ordinance, § 15.05, which provides:

> No person shall disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University.

"The first step in overbreadth analysis is to construe the challenged statute" because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[27] This ordinance makes it a crime to "disrupt the normal activity . . . of any person, firm, or agency . . . carrying out service, activity or agreement for or with the University." Defendant argues that this language is facially overbroad because it substantially infringes on First Amendment

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[23] *Id*. at 465-466, quoting *United States v Reese*, 92 US (2 Otto) 214, 221; 23 L Ed 563 (1876).

[24] *Hill*, 482 US at 466-467.

[25] *Id*.

[26] *Id*. at 466.

[27] *Williams*, 553 US at 293.

rights. We agree with defendant and hold that the phrase "disrupt the normal activity" in the ordinance is facially overbroad.[28]

The MSU ordinance prohibits disruptions but does not specify the types of disruptions that are prohibited. Thus, the plain language of the ordinance allows its enforcement for even *verbal* disruptions. Moreover, like the ordinance that the United States Supreme Court invalidated in *Hill*, the verbal disruptions that the MSU ordinance criminalizes are not limited to those containing fighting words or obscene language. Instead, the MSU ordinance explicitly criminalizes any disruption of the normal activity of persons or entities carrying out activities for or with MSU. Not only does the ordinance fail to limit the types of disruptions that are prohibited, it also protects a much broader class of individuals than the ordinance at issue in *Hill*. The plain language of this ordinance allows it to be enforced against *anyone* who disrupts in *any* way *anyone* carrying out *any* activity for or with MSU. Like the ordinance in *Hill*, which was "admittedly violated scores of times daily,"[29] the MSU ordinance could be violated numerous times throughout any given day given that there are seem-

[28] Aside from the phrase "disrupt the normal activity," the MSU ordinance also prohibits "molest[ing] the property" of a protected person. Because this alternative basis for enforcement does not implicate speech, we find no need to address whether it is facially overbroad. Moreover, MSU Ordinance, § 49.01 provides that "[i]f any provision of these ordinances or part thereof shall be adjudged invalid by a court . . . , then such adjudication shall not affect the validity of . . . any provision or part thereof not so adjudged invalid." Accordingly, the language in the ordinance prohibiting someone from "molest[ing] the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University" remains in force.

[29] *Hill*, 482 US at 466.

ingly infinite ways in which someone might "disrupt" another who is engaged in an "activity" for or with MSU. Thus, we believe that this ordinance, just like the ordinance in *Hill*, "criminalizes a substantial amount of constitutionally protected speech . . . ."[30]

The Court of Appeals found *Hill* distinguishable from this case because the *Hill* ordinance specifically protected police officers who have the power to arrest violators at the officers' discretion, while the MSU ordinance only prohibits the disruption of MSU employees who do not necessarily have the power to arrest violators.[31] We disagree with this distinction. The MSU ordinance prohibits the disruption of MSU police officers while they are carrying out their duties for the university, and those police officers have the explicit power to enforce the ordinance and arrest violators.[32] Thus, the concerns that *Hill* had regarding "[t]he freedom of individuals verbally to oppose or challenge

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[30] *Id.*

[31] The Court of Appeals also observed that the ordinance "prohibits the disruption of MSU *employees* . . . performing their duties." *Rapp*, 293 Mich App at 165 (emphasis added). While the ordinance does prohibit the disruption of MSU employees performing their duties, the plain language of this ordinance does not apply to MSU employees *only*. Rather, it prohibits the disruption of *anyone*, MSU employee or not, who is "carrying out service, activity or agreement for or with the University."

[32] MSU Ordinance, § 4.01 states:

> The Board of Trustees entrusts the Police Chief and Director of the Department of Police and Public Safety . . . and subordinate officers, including police officers, and also traffic control officers, parking enforcement officers, and other special or limited duty officers, whom he or she appoints, with responsibility for enforcing these ordinances.

Furthermore, MSU Ordinance, § 5.01 allows MSU police officers to "apprehend and arrest any person in violation of any provision of these ordinances and . . . make complaint against such violator before any judge or judicial officer having jurisdiction . . . ."

police action without thereby risking arrest" apply equally to the MSU ordinance.[33]

Moreover, the distinction regarding whether an individual protected by the ordinance has the power to arrest is an irrelevant one. An MSU student, for example, enrolled in classes on campus is undoubtedly carrying out an activity with MSU and, therefore, is protected by the ordinance. Nothing in the plain language of the ordinance prevents a student who simply feels that he or she has been disrupted by the actions or words of another person from seeking enforcement of this ordinance. Nor does the ordinance language prevent a police officer from choosing to enforce the ordinance when there is a complaint or simply when the officer witnesses somebody disrupting another person's activity.[34] While not all protected individuals have the same power as a police officer to arrest, the ordinance is nonetheless a criminal statute that subjects the violator to a misdemeanor conviction and provides someone who *does* have the power to arrest with the opportunity to do so whenever a protected individual is

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[33] *Hill*, 482 US at 462-463. The prevalence of daily ordinance violations alone does not make the law constitutionally suspect; rather, what makes the law constitutionally suspect is the prevalence of violations that encompass protected speech and the threat of selective enforcement of the ordinance against that protected speech.

[34] The United States Supreme Court has explained that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984). However, the Court cautioned in *Hill* that "if some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Hill*, 482 US at 462 n 11. The Court concluded that the ordinance in *Hill* was violated many times on a daily basis. Similarly, there is a realistic danger that the broad prohibition in the MSU ordinance is violated regularly.

disrupted.[35] Accordingly, this ordinance can be said to "provide the police with unfettered discretion to arrest individuals for *words or conduct* that annoy or offend them," just as the ordinance in *Hill* did.[36] Thus, like the unconstitutional ordinance in *Hill*, the MSU ordinance is "susceptible of regular application to protected expression," regardless of whether the protected individual has the power to arrest.[37]

The Court of Appeals further attempted to distinguish *Hill* because the ordinance in that case used the word "interrupt," while the MSU ordinance uses the word "disrupt."[38] *The American Heritage Dictionary of the English Language* (2006), quoted by the Court of Appeals, defines "disrupt" as "[t]o throw into confusion or disorder" or "[t]o *interrupt* or impede the progress, movement, or procedure of[.]"[39] The Court of Appeals reasoned that a person can "interrupt an action without causing disorder or confusion, such as by merely asking a question," but "the same conduct does not necessarily

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[35] In fact, the instant case demonstrates the realistic danger that a wide range of people may enforce this MSU ordinance that imposes criminal consequences. After Rego's interaction with defendant, Rego called the university police, which he testified is standard procedure when an individual becomes upset about a parking ticket. Despite the fact that Rego was a parking enforcement officer without the power to make an arrest, criminal charges were brought against defendant for violating the MSU ordinance.

[36] *Hill*, 482 US at 465 (emphasis added).

[37] *Id*. at 467.

[38] *Rapp*, 293 Mich App at 165.

[39] Emphasis added. By its very nature, an interruption affects the "progress, movement, or procedure" of *something*. In fact, both the *Hill* ordinance and the MSU ordinance require the protected person to be doing something—the *Hill* ordinance prohibited interrupting an officer "in the execution of his duty," *Hill*, 482 US at 455, while the MSU ordinance prohibits disrupting a protected person's "activity," MSU Ordinance, § 15.05.

disrupt . . . ."[40] The Court of Appeals then explained that its reasoning compelled the conclusion that while the term "interrupt" used in the *Hill* ordinance may encompass a substantial amount of constitutionally protected conduct, "the same can not necessarily be said" of the term "disrupt" used in the MSU ordinance.[41] We disagree with this analysis.

Under the definition chosen by the Court of Appeals, "disrupt" explicitly includes "interrupt." Other dictionaries similarly include "interrupt" in the definition of "disrupt."[42] Moreover, the terms "interrupt" and "disrupt" are commonly used as synonyms.[43] Nevertheless, the Court of Appeals' reasoning implies that the term "interrupt" is capable of encompassing verbal interruptions, thereby implicating constitutionally protected conduct, while the term "disrupt" is somehow limited to nonverbal acts and thereby incapable of reaching protected conduct. However, nothing in the ordinary meanings of "interrupt" and "disrupt" supports this reasoning. More importantly, nothing in the ordinances at issue in *Hill* or this case creates that distinction.

The dictionary definition used by the Court of Appeals essentially provides that a person can "disrupt"

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[40] *Rapp*, 293 Mich App at 165.

[41] *Id*.

[42] *Random House Webster's College Dictionary* (2d ed, 2001) defines "disrupt" as "to destroy . . . temporarily, the normal continuance or unity of; interrupt: *to disrupt broadcasting*."

[43] Burton, *Legal Thesaurus* (2d ed) (New York: Macmillan Publishing Co, 1992), p 181; see also *Roget's II: The New Thesaurus* (3d ed) (Boston: Houghton Mifflin Co, 2003), pp 119, 290 (listing the terms "break," "discontinuance," "discontinuation," "discontinuity," "interruption," "pause," "suspension," and "disruption" as synonyms); Vocabulary.com <http://www.vocabulary.com/dictionary/interrupt> (accessed July 26, 2012) (listing the term "disrupt" as a synonym for the term "interrupt" and stating that "[t]o *interrupt* someone is to interfere in their activity, disrupt their conversation, or to disturb their peace and quiet").

another person by either (1) interrupting that person or (2) causing disorder or confusion.[44] Given this definition, one way to violate the MSU ordinance is to disrupt a person by interrupting that person. There is no question that the United States Supreme Court concluded in *Hill* that an ordinance broadly prohibiting interruptions reaches "a substantial amount of constitutionally protected speech . . . ."[45] A person may also violate the MSU ordinance, under this definition of "disrupt," by causing disorder or confusion. This means that if a person asks another person several questions, which causes that other person's activity to be "thrown into confusion or disorder," a prohibited disruption has occurred. Both ways in which a person may disrupt another person can be accomplished by purely *expressive* conduct.[46] And regardless of which definition of

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[44] The dissent acknowledges this very same definition, yet it then asserts that only "*some* interruptions rise to the level of disruptions . . . ." *Post* at 95. This assertion is perhaps based on the dissent's view that the term "disrupt" requires the creation of " 'confusion or disorder.' " *Post* at 91. While it is true that one way to "disrupt" a person is to create confusion or disorder, the quoted definition of "disrupt" clearly indicates that another way to "disrupt" a person is to "interrupt" that person.

[45] *Hill*, 482 US at 466.

[46] The dissent opines that the term "disrupt" suggests a "severe impediment" that "most often result[s] from a nonexpressive, physical disturbance rather than the verbal interjection of a viewpoint." *Post* at 91-92. The dissent ultimately concludes that the MSU ordinance reaches less protected expression than the *Hill* ordinance, yet the dissent also acknowledges that words or expressive conduct can "disrupt." See *post* at 92, 104. The task of the court is to determine whether the enactment reaches a substantial amount of protected activity. "[T]hose that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Hill*, 482 US at 459. Moreover, the First Amendment protects more than just verbal speech. See *Tinker v Des Moines Indep Community Sch Dist*, 393 US 503; 89 S Ct 733; 21 L Ed 2d 731 (1969) (holding that a regulation prohibiting wearing armbands to schools in protest of the Vietnam War and providing for suspension of any student refusing to remove the

"disrupt" is applied, the MSU ordinance can be used to reach and criminalize "a substantial amount of constitutionally protected conduct."[47]

Finally, we note that our analysis is not affected by *Hill*'s observation of an anomaly in Texas law whereby the ordinance in that case was preempted to the extent that the Texas Penal Code already covered the proscribed conduct. Because Texas law preempted enforce-

armbands was an unconstitutional denial of students' right of expression of opinion); *Texas v Johnson*, 491 US 397; 109 S Ct 2533; 105 L Ed 2d 342 (1989) (holding that the defendant's act of burning an American flag during a protest rally was expressive conduct within the protection of the First Amendment); *Hill v Colorado*, 530 US 703; 120 S Ct 2480; 147 L Ed 2d 597 (2000) (holding that people have the right to protest, display signs, and pass out leaflets, but the state may reasonably regulate the time, place, and manner of these activities); *Cohen v California*, 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971) (holding that the defendant could not be punished for walking through a courthouse wearing an offensive t-shirt).

[47] *Hoffman Estates*, 455 US at 494. Despite the fact that the MSU ordinance criminalizes constitutionally protected conduct, the dissent asserts that the ordinance is valid because "a university can implement measures to prevent disruptions of the academic environment." *Post* at 102. The dissent cites *Tinker*, 393 US 503, and *Hazelwood Sch Dist v Kuhlmeier*, 484 US 260; 108 S Ct 562; 98 L Ed 2d 592 (1988), as authority for this proposition. However, those cases do not support the dissent's position. Both *Tinker* and *Kuhlmeier* involved the constitutional rights of *minors* in public schools. While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 US at 506, the United States Supreme Court acknowledged that "the constitutional rights of students in public school are not automatically coextensive with the rights of *adults* in other settings," *Bethel Sch Dist No 403 v Fraser*, 478 US 675, 682; 106 S Ct 3159; 92 L Ed 2d 549 (1986) (emphasis added). Given that minors do not automatically have the same rights as adults, the Court explained in both *Tinker* and *Kuhlmeier* that the rights of students must be " 'applied in light of the special characteristics of the school environment . . . .' " *Kuhlmeier*, 484 US at 266, quoting *Tinker*, 393 US at 506. This case involves the constitutional rights of anyone who disrupts any person engaging in any activity with MSU and does not involve the unique issues that arise with regard to the rights of minors in public schools.

ment of that portion of the *Hill* ordinance that criminalized someone who "assault[s]" or "strike[s]" a police officer, "the enforceable portion of the ordinance" made it " 'unlawful for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty,' and thereby prohibits verbal interruptions of police officers."[48]

While defendant does not offer any Michigan law similar to the Texas preemption statute, we note that separate statutes and MSU ordinances already criminalize physical assaults. For instance, MSU Ordinance, § 22.01 provides that "[n]o person shall accost, molest, or harass any person upon the lands governed by the Board [of Trustees]." And, of course, MCL 750.81 criminalizes all assaults that occur within the state, regardless of whether they occur on MSU grounds. Thus, for all practical purposes, the only disruptions that the MSU ordinance *newly* criminalizes are the same nonphysical ones that the enforceable portion of the *Hill* ordinance proscribed. In other words, just as Texas law criminalized physical assaults on police offic-

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[48] *Hill*, 482 US at 460-461. The dissent appears to read the enforceable portion of the *Hill* ordinance too narrowly, stating that it applied *only* to verbal interruptions. However, *Hill*'s discussion of preemption does not support the dissent's position. In *Hill*, the United States Supreme Court explained that because the *Hill* ordinance made it "unlawful" to "interrupt" a police officer "in any manner," the ordinance prohibited verbal interruptions and, thereby, affected protected speech. *Hill*, 482 US at 461. *Hill* stated that preemption existed with regard to *physical assaults* and disorderly conduct and cited the relevant provisions in Texas law criminalizing that conduct; the Court concluded that, as a result of preemption, the enforceable provisions of the ordinance did not apply to the core criminal conduct attendant to physical assaults and disorderly conduct. However, *Hill* did not cite any Texas law that preempted *all* nonverbal interruptions of police officers, as the dissent suggests. The enforceable provisions of the *Hill* ordinance still covered many nonverbal interruptions as long as those interruptions were nonassaultive and did not rise to the level of disorderly conduct.

ers in the absence of the *Hill* ordinance, state statutes and MSU ordinances already criminalize any physical assault that disrupts someone on the MSU campus even in the absence of MSU Ordinance, § 15.05.[49] As a result, the partial preemption of the *Hill* ordinance does not compel a different result in this case.

Accordingly, we hold that under *Hill*, the language in MSU Ordinance, § 15.05 making it an offense to "disrupt the normal activity" of a protected person is facially unconstitutional.

Next, we address whether MCR 7.101(O) allows taxation of costs in criminal appeals in the circuit court. MCR 7.101(O) provides:

> Costs in an appeal to the circuit court may be taxed as provided in MCR 2.625. A prevailing party may tax only the reasonable costs incurred in the appeal, including:
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> (1) the cost of an appeal or stay bond;
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> (2) the transcript;
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> (3) documents required for the record on appeal;
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> (4) fees paid to the clerk or to the trial court clerk incident to the appeal;

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[49] We reject any concerns that under our decision, certain nonassaultive campus disruptions, such as someone running onto a stadium field or playing loud music to disrupt a class in session, will now be permitted. Such hypothetical nonassaultive disruptions are already prohibited. For example, MSU Ordinance, § 15.06 prohibits an unauthorized person from entering the playing area of any athletic contest or exhibition while the contest or exhibition is in progress. Furthermore, § 15 of the MSU Ordinance Code specifically states that the operation of a sound amplifying device "in such a manner as to create a noise disturbance" is a violation of the section. Moreover, to the extent that other hypothetical nonassaultive disruptions may not be covered by existing prohibitions, the MSU Board of Trustees has the authority to establish new prohibitions against unprotected conduct "as it may deem necessary to secure the successful operation of the college and to promote its designed objects." MCL 390.106.

(5) taxable costs allowed by law in appeals to the Supreme Court (MCL 600.2441); and

(6) other expenses taxable under applicable court rules or statutes.

Defendant argues that he is entitled to reimbursement for the costs he incurred because the prosecution pursued its case against him on the basis of an unconstitutional statute. While the circuit court granted defendant's motion for taxation of costs, the Court of Appeals reversed that decision on the basis that there is no statutory authority allowing the assessment of costs in this matter. We agree with the Court of Appeals' analysis of this issue.

MCR 7.101(O) explicitly states that "costs . . . may be taxed as provided in MCR 2.625." MCR 2.625 is a rule of civil procedure, which does not apply to a criminal matter.[50] MCR 7.101(O)(5) refers to MCL 600.2441, a statute that applies only to the taxation of costs in civil matters.[51] Because this case is a criminal matter, MCR 7.101(O) does not provide grounds for awarding costs.[52]

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[50] While MCR 6.001(D)(2) generally applies the rules of civil procedure to criminal cases, that rule contains an exception "when it clearly appears" that the rules "apply to civil actions only[.]" MCR 2.625(A) allows "the prevailing party in an action" to be awarded costs, while MCR 2.625(B) further specifies which party is the prevailing party. These provisions clearly appear to "apply to civil actions only" within the meaning of MCR 6.001(D)(2) because they discuss, for example, the prevailing party in terms of "separate judgments," "different causes of action," and the "amount" of a judgment.

[51] MCL 600.2441(2) states that it applies "[i]n all civil actions or special proceedings in the circuit court . . . ."

[52] Defendant's argument is essentially that the prosecution's case was frivolous. However, even under MCR 2.625(2), which governs taxation of costs for frivolous claims and defenses, costs may only be awarded in accordance with MCL 600.2591. MCL 600.2591(1) provides that "if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the

Accordingly, the Court of Appeals correctly concluded that there is no basis to "undermine the broad statutory discretion granted the prosecution in its charging decisions,"[53] and the assessment of costs against the prosecution in this case was improper.

IV. CONCLUSION

We conclude that the language in MSU Ordinance, § 15.05 making it an offense to "disrupt the normal activity" of a protected person is facially overbroad, as articulated by the United States Supreme Court in *Hill*. Therefore, we reverse the judgment of the Court of Appeals in part and reinstate the circuit court's decision to the extent that the circuit court held that the quoted language is facially unconstitutional. On the issue of costs, we agree with the Court of Appeals' conclusion that the circuit court erroneously assessed costs against the prosecution and, therefore, we affirm the Court of Appeals' judgment in part.

YOUNG, C.J., and CAVANAGH, MARILYN KELLY, and MARY BETH KELLY, JJ., concurred with HATHAWAY, J.

ZAHRA, J. (*dissenting*). I respectfully dissent from the majority's conclusion that the language in Michigan State University (MSU) Ordinance, § 15.05 that makes it an offense to "disrupt the normal activity" of a protected person is unconstitutional under *City of Houston, Texas v Hill*.[1] Significantly, the issue of whether the ordinance was unconstitutionally applied

costs and fees incurred . . . ." Again, MCR 2.625 does not provide statutory authority for taxation of costs in this criminal matter.

[53] *Rapp*, 293 Mich App at 167.

[1] *City of Houston, Texas v Hill*, 482 US 451; 107 S Ct 2502; 96 L Ed 2d 398 (1987).

to defendant for engaging in protected expression is not before this Court. Addressing defendant's facial challenge, the majority concludes that the overbreadth of the ordinance is so substantial that it must be struck down. The decision to strike down the instant ordinance, and thereby nullify a decision of the university's legislative body, is a matter of considerable consequence. This Court is responsible for upholding both the Michigan and federal constitutions, but its authority to invalidate laws is limited and must be predicated on a clear and apparent demonstration of unconstitutionality. Absent that demonstration, the majority's decision, in my judgment, is an expansion of judicial power and an unwarranted encroachment on the legislative branch of government.

In my view, *Hill* does not provide sufficient grounds to conclude that MSU Ordinance, § 15.05 reaches a substantial amount of constitutionally protected expression relative to its plainly legitimate sweep. I am also not convinced that the ordinance presents a realistic danger of significantly compromising First Amendment freedoms. Finally, the majority fails to consider the context of the academic environment in reaching its decision. I would affirm the judgment of the Court of Appeals upholding MSU Ordinance, § 15.05 as constitutional on its face and remanding the case to the trial court for consideration of defendant's as-applied challenge.[2]

I. THE OVERBREADTH DOCTRINE

Laws are presumed constitutional, and this Court

[2] Although my conclusion that defendant does not prevail in his constitutional challenge makes it unnecessary for me to reach the second question presented in this appeal, I nonetheless agree with the majority and the Court of Appeals that MCR 7.101(O) does not permit the assessment of costs in criminal matters.

must construe a law as constitutional unless its unconstitutionality is clearly apparent.[3] The burden of proving that a law is unconstitutional falls on the party bringing the challenge.[4]

Facial overbreadth, as alleged here, is a unique breed of constitutional challenge because of the competing social costs at issue.[5] The first concern is that the threat of enforcement of an overbroad law may have a chilling effect on protected expression, which is harmful because it deprives society of an uninhibited marketplace of ideas.[6] The fear is that the law's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[7] To address this concern, the overbreadth doctrine allows parties to challenge laws without establishing the traditional standing requirements.[8] That is, it "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected."[9] Accordingly, "[t]he overbreadth doctrine is an exception to the traditional rule of practice that 'a

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[3] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011); *People v Barton*, 253 Mich App 601, 603-604; 659 NW2d 654 (2002) (applying a presumption of constitutionality to an ordinance challenged on overbreadth grounds).

[4] *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007).

[5] *United States v Williams*, 553 US 285, 292-293; 128 S Ct 1830; 170 L Ed 2d 650 (2008).

[6] *Virginia v Hicks*, 539 US 113, 119; 123 S Ct 2191; 156 L Ed 2d 148 (2003).

[7] *Broadrick v Oklahoma*, 413 US 601, 612; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

[8] *Id.* at 613.

[9] *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000).

person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court.' "[10]

"The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[11] The competing social cost of the overbreadth doctrine, therefore, is that it prevents a law from applying to constitutionally unprotected speech and even constitutionally unprotected conduct, which can result in obvious harm to society.[12] Accordingly, "[i]n order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[13] Further, to invalidate a law, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . ."[14] Invalidation for overbreadth is "strong medicine" that should be used "sparingly and only as a last resort" and not "when a limiting construction has been or could be placed on the challenged statute."[15]

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[10] *Id.*, quoting *Broadrick*, 413 US at 610.

[11] *Broadrick*, 413 US at 613.

[12] *Hicks*, 539 US at 119.

[13] *Williams*, 553 US at 292.

[14] *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984).

[15] *Broadrick*, 413 US at 613.

II. DEFENDANT FAILS TO DEMONSTRATE THAT THE ORDINANCE REACHES A SUBSTANTIAL AMOUNT OF PROTECTED EXPRESSION

In *Hill*, the Court struck down as facially overbroad a Houston ordinance making it " 'unlawful for any person to assault, strike or in any manner oppose, molest, abuse or *interrupt* any policeman in the execution of his duty, or any person summoned to aid in making an arrest.' "[16] In contrast, MSU Ordinance, § 15.05 states, "No person shall *disrupt* the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University."[17] In my view, the text of the Houston ordinance and the Supreme Court's stated reasons for striking it down are sufficiently distinguishable from this case that *Hill*, the sole basis for defendant's challenge, does not support the majority's conclusion that MSU Ordinance, § 15.05 reaches a substantial amount of protected expression.

The majority's use of *Hill* to guide its analysis is problematic in the first instance because it effectively turns the presumption of constitutionality on its head. Although the majority states that it "presumes that ordinances are constitutional,"[18] its analysis uses a case in which an ordinance was declared unconstitutional as a point of reference and from there reasons that no basis exists for not treating that case as controlling. The majority's analysis suggests a presumption of *unconstitutionality*. The majority's reliance on *Hill* is also problematic because it allows the majority to evade a traditional overbreadth analysis in what amounts to an attempt to fit

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[16] *Hill*, 482 US at 455, quoting Houston Ordinance, § 34-11(a) (1984) (emphasis added).

[17] Emphasis added.

[18] *Ante* at 72.

a square peg into a round hole. Careful review reveals that the majority's analysis presents an oversimplified version of *Hill* that downplays its distinguishing aspects, creating only the appearance of a good fit.

Beginning with the most obvious distinction, the Houston ordinance made it unlawful to "interrupt" a police officer in the execution of his or her duties, whereas MSU Ordinance, § 15.05 makes it unlawful to "disrupt" the normal activity of a protected person carrying out an activity for or with MSU. Contrary to the majority's assertion, these terms are not used in a largely synonymous fashion by those who use the English language carefully, as judges must, and the majority's use of thesaurus references is misleading.[19] The term "interrupt" is defined as "[t]o break the continuity or uniformity of," whereas "disrupt" means "[t]o throw into confusion or disorder" or "[t]o interrupt or impede the progress, movement, or procedure of[.]"[20]

Significantly, the term "interrupt" typically carries a verbal connotation.[21] By contrast, the term "disrupt" carries a comparatively strong connotation that suggests not merely a verbal interjection or expression of a viewpoint, but an actual and severe impediment to the carrying out of one's activities.[22] For example, in the

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[19] A thesaurus groups related concepts and provides a list of terms having similar meanings. A particular term may be more or less appropriate than another term given the particular context in which the term is being used. A thesaurus does not supply a list of synonymous terms that should be used interchangeably as if they have identical meanings.

[20] *The American Heritage Dictionary of the English Language* (2006).

[21] See Merriam-Webster <http://www.merriam-webster.com/dictionary/interrupt> (defining "interrupt" as "to stop or hinder by breaking in " or "to break in upon an action; *especially*: to break in with questions or remarks while another is speaking") (accessed July 26, 2012).

[22] The respective prefixes of "interrupt" and "disrupt" buttress this conclusion. The prefix "inter-" means between, reciprocal, or shared,

context of a meeting, whereas a meeting may proceed once an interruption is over, a disruption will likely end the meeting. In my view, as this example illustrates, disruptions most often result from a nonexpressive, physical disturbance rather than the verbal interjection of a viewpoint.[23] This is not to say that it is impossible for a person to disrupt the normal activity of a protected person through words or expressive conduct. Nevertheless, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[24]

The majority, however, construes the term "disrupt" as synonymous with "interrupt," relying primarily on its second dictionary definition, which is "[t]o *interrupt* or impede the progress, movement, or procedure of[.]" Using this definition, the majority concludes that MSU Ordinance, § 15.05 is comparable to the Houston ordinance because "a person can 'disrupt' another person by . . . interrupting that person . . . ."[25]

The majority's synthesis is not faithful to the language in the dictionary definition of "disrupt" or to MSU Ordinance, § 15.05. The second dictionary definition of "disrupt" is to interrupt *the progress*, interrupt *the movement*, or interrupt *the procedure* of. And MSU Ordinance, § 15.05 provides that "[n]o person shall

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whereas "dis-" connotes opposite action, deprivation, or exclusion. See Merriam-Webster <http://www.merriam-webster.com/dictionary/inter-> (accessed July 26, 2012); Merriam-Webster <http://www.meriam-webster.com/dictionary/dis-> (accessed July 26, 2012).

[23] I am well aware that "the First Amendment protects more than just verbal speech." *Ante* at 81 n 46. As the majority notes, it also protects expressive conduct. See, e.g., *Tinker v Des Moines Indep Community Sch Dist*, 393 US 503; 89 S Ct 733; 21 L Ed 2d 731 (1969). My position, however, is that disruptions are typically *nonexpressive*, making the majority's discussion in footnote 46 of its opinion largely irrelevant.

[24] *Los Angeles City Council*, 466 US at 800.

[25] *Ante* at 80-81.

disrupt *the normal activity* . . . of [a protected person]."[26] Thus, the ordinance language is focused not on disrupting the *person*, but on disrupting the *normal activity* in which the person is engaged. The following statement is a more accurate synthesis of the second dictionary definition of "disrupt" and MSU Ordinance, § 15.05: No person shall interrupt the progress, the movement, or the procedure of the normal activity of a protected person.

Interrupting the progress, the movement, or the procedure of a normal activity is a far cry from interrupting a person, and this difference indicates that MSU Ordinance, § 15.05 is less concerned with silencing speech and more concerned with allowing legitimate activities on campus to go unimpeded. The scope of the ordinance is further limited because a protected person's "normal activity" may include being verbally interrupted by other people. It is part of a professor's normal activity, for example, to be interrupted by students asking questions. It is likewise part of a police officer's or a parking enforcement officer's normal activity to be interrupted by having to respond to legitimate questions from the public. MSU Ordinance, § 15.05 does not prohibit these interruptions. The majority, having relied primarily on the second dictionary definition of "disrupt," fails to discuss any of these subtleties or engage in any balancing analysis that takes into consideration the legitimate sweep of MSU Ordinance, § 15.05.

Applying the first dictionary definition of "disrupt," another way to violate the ordinance is to throw into confusion or disorder the normal activity of a protected person. Certainly, a person can interrupt without throwing into confusion or disorder the normal activity

[26] Emphasis added.

of a protected person—for instance, by asking a question.[27] Accordingly, while all disruptions may be considered interruptions (as suggested by the inclusion of "interrupt" in the second dictionary definition of "disrupt"), not all interruptions rise to the level of disruptions.[28] It is also no mistake that the term "disrupt" is not included in the dictionary definition of "interrupt," as one would expect if the terms were truly synonymous. Accordingly, the term "disrupt" carries a different meaning than "interrupt."

Nonetheless, according to the majority, disruptions that throw into confusion or disorder the normal activity of a protected person also implicate purely expressive conduct and, therefore, MSU Ordinance, § 15.05 reaches a substantial amount of protected expression under either dictionary definition of "disrupt." As an example, the majority asserts that "if a person asks another person several questions, which causes that other person's activity to be 'thrown into confusion or disorder,' a prohibited disruption has occurred."[29] The Court in *Hill*, however, addressed the majority's hypothetical example and concluded that a municipality may constitutionally punish such conduct. Specifically, the Court agreed with Justice Powell that " 'a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection.' "[30] Stated dif-

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[27] See *People v Rapp*, 293 Mich App 159, 165; 809 NW2d 665 (2011).

[28] Although I tend to agree that anytime someone "disrupts" he or she also "interrupts," it does not follow, contrary to the majority's conclusion, that anytime someone "interrupts" he also "disrupts." In other words, one can interrupt without disrupting, but one cannot disrupt without interrupting.

[29] *Ante* at 81.

[30] *Hill*, 482 US at 462 n 11 (citation omitted).

ferently, the interruption, expressive or otherwise, is not protected if it prevents the officer from directing traffic at a busy intersection. The Court explained, however, that a municipality may not do what Houston did, which was "to attempt to punish such conduct . . . by authorizing the police to arrest a person who *in any manner* verbally interrupts an officer."[31] MSU Ordinance, § 15.05, however, does not make it unlawful to *in any manner* disrupt a protected person. Rather, a disruption is prohibited only if it prevents a protected person from carrying out an activity for or with MSU, making it narrower than the Houston ordinance.

The linguistic differences between the ordinances reveal the logical fallacy employed by the majority. In essence, the majority reasons that, because the Supreme Court held that the term "interrupt" in the Houston ordinance reached a substantial amount of protected expression, and because *some* interruptions rise to the level of disruptions, then the term "disrupt" in the MSU ordinance also reaches a substantial amount of protected expression. This is a non sequitur—the conclusion does not follow from the premises. Rather, all that can be drawn from *Hill* is that MSU Ordinance, § 15.05 reaches less protected expression than the Houston ordinance.[32] This, of course, falls short of defendant's burden to establish *substantial* overbreadth, and it leaves this Court with insufficient grounds to invalidate the ordinance.

Furthermore, the majority effectively ignores a major facet of the Court's rationale in *Hill* for striking down

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[31] *Id*. (emphasis altered).

[32] I find no relevance in the majority's observation that MSU Ordinance, § 15.05 "protects a much broader class of individuals than the ordinance at issue in *Hill*," *ante* at 76, because I do not believe that the prohibition against disrupting reaches a substantial amount of protected expression.

the Houston ordinance. The Court interpreted the Houston ordinance as targeting speech and not core criminal conduct in large part because the Texas Penal Code preempted governmental subdivisions or agencies from enacting or enforcing laws that purported to criminalize any form of physical assault against a police officer, and the city conceded the issue of preemption in the Supreme Court.[33] The Court stated that, as preempted, "the enforceable portion of the ordinance deals not with core criminal conduct, *but with speech*."[34] The Court also stated that "[t]he enforceable portion of this ordinance is a general prohibition of speech that 'simply has no core' of constitutionally unprotected expression to which it might be limited."[35] Indeed, given the extent of preemption, the Court went as far as to say that "limiting the ordinance to 'physical acts' would be equivalent to invalidating it on its face."[36] Thus, the Court construed the enforceable portion of the ordinance as prohibiting only "*verbal* interruptions of police officers."[37] To the extent that the ordinance prohibited nonverbal interruptions or other physical affronts directed toward police officers, the ordinance was preempted.[38]

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[33] *Hill*, 482 US at 460, 461 n 9. Given the city's concession, the Court chose not to address whether the ordinance would be substantially overbroad if not preempted by the Texas Penal Code. *Id*.

[34] *Id.* at 460 (emphasis added).

[35] *Id.* at 468 (citation omitted).

[36] *Id*. at 469 n 18.

[37] *Id*. at 461 (emphasis added).

[38] *Id*. at 460-461. The Court noted that the Texas Penal Code broadly defined "assault" as including "any provocative contact with . . . any person," making it much broader than the traditional concept of assault. *Hill*, 482 US at 460 n 8; Tex Penal Code Ann 22.01(a). Given that the Houston ordinance was preempted to the extent that it prohibited any provocative contact whatsoever, my reading of the enforceable portion of the ordinance as limited to verbal interruptions is not overly narrow. Is not a physical interruption a form of provocative contact? Further, the

Given this limited construction, the Court sensibly concluded that the Houston ordinance criminalized a substantial amount of protected expression relative to its plainly legitimate sweep. In this case, however, neither defendant nor the majority identifies a Michigan law that preempts MSU Ordinance, § 15.05. Accordingly, it is enforceable against physical disruptions. Because the enforceability of the ordinance is not limited to mere verbal disruptions, it has a far broader legitimate sweep than the Houston ordinance.[39]

The majority asserts that because existing laws "already criminalize any physical assault that disrupts someone on the MSU campus . . . , the partial preemption of the *Hill* ordinance does not compel a different result in this case."[40] The majority's statement misses the point. It did not matter in *Hill* that Texas law already criminalized physical assaults on police officers;

Court acknowledged that the Texas Penal Code did far more than preempt the enactment of laws criminalizing physical assaults. As one example, the Court noted that the Houston ordinance was preempted to the extent that it criminalized disorderly conduct. *Hill*, 482 US at 465 n 13; Tex Penal Code Ann 42.01. In any case, the majority concedes that the Court construed the Houston ordinance as unenforceable against many types of physical interruptions. By contrast, the Michigan Legislature has not barred local units of government from enforcing ordinances that bar provocative or assaultive contact. Thus, no part of the MSU ordinance is preempted. Therefore, the ordinance has a broader legitimate sweep than the Houston ordinance. The lack of preemption in this case is a significant distinction that the majority all but ignores.

[39] That MSU Ordinance, § 15.05 is not limited to verbal disruptions does not imply that the ordinance is somehow limited to nonverbal disruptions, and I disagree with the majority that the Court of Appeals implied that it is. *Ante* at 80 (asserting that "the Court of Appeals' reasoning implies that . . . the term 'disrupt' is somehow limited to nonverbal acts"). I agree fully with the Court of Appeals' statement that "while to 'interrupt' could be deemed, as it was in *Hill*, to reach a substantial amount of constitutionally protected conduct, the same can not necessarily be said of 'disrupt.' " *Rapp*, 293 Mich App at 165.

[40] *Ante* at 84.

it mattered that the Texas Legislature had preempted the city from doing the same. Absent a similar preemption statute, the mere existence of MSU ordinances and statutes criminalizing certain campus disruptions does not align this case with *Hill*.

For all these reasons, *Hill*, the sole basis for defendant's facial challenge, does not support the majority's conclusion that MSU Ordinance, § 15.05 reaches a substantial amount of constitutionally protected expression.

III. DEFENDANT FAILS TO DEMONSTRATE A REALISTIC DANGER THAT THE ORDINANCE WILL SIGNIFICANTLY COMPROMISE FIRST AMENDMENT FREEDOMS

In addition to examining the language of an ordinance, it is appropriate to examine the likelihood of the ordinance's unconstitutional application. Even in a facial overbreadth challenge, the party bringing the challenge must demonstrate "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . ."[41] In *Hill*, the appellee introduced city records indicating the frequency with which arrests had been made under the Houston ordinance and the types of exchanges that had led to those arrests.[42] The United States Court of Appeals for the Fifth Circuit reasoned that the evidence provided by the appellee showed a realistic danger that the city's application of the ordinance significantly compromised protected expression, and the Supreme Court did not disturb that conclusion.[43] The Supreme Court further observed that the ordinance was "*admittedly* violated scores of times daily . . . ."[44]

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[41] *Los Angeles City Council*, 466 US at 801.

[42] *Hill*, 482 US at 455.

[43] *Id*. at 457.

[44] *Id*. at 466 (emphasis added).

In this case, however, defendant provides no examples of protected expression that the ordinance has or could prohibit, and his characterization of the behavior for which he was cited as merely asking a parking official for his name is inconsistent with a fair reading of the record.[45] In particular, there is evidence that defendant drove toward the parking official in his vehicle at an aggressive speed, leapt out of his vehicle, approached the official in an aggressive manner, took pictures of the official with his cell phone, yelled at the official regarding the ticket, and demanded to know the official's name. In response, and out of concern for what defendant might do next, the official returned to the inside of his truck and summoned the university police for assistance. Although I do not opine on defendant's as-applied challenge, the record viewed as a whole belies defendant's claim that he received a citation merely for interrupting a parking official to ask for his name. Defendant has also otherwise failed to show a history of enforcement of the ordinance against protected expression. Finally, unlike in *Hill*, no one has *admitted* that the ordinance at issue in this case is violated scores of times daily by persons engaging in protected expression.[46] Thus, I do not believe that defendant has dem-

[45] Because this is a facial challenge, defendant is not required to show that the ordinance is unconstitutional as applied to him. Nonetheless, he still must demonstrate that the ordinance presents a realistic danger of significantly compromising First Amendment freedoms.

[46] The majority asserts that "the MSU ordinance *could* be violated numerous times throughout any given day" because "there are seemingly infinite ways" to disrupt a protected person. *Ante* at 76-77 (emphasis added). That "there are seemingly infinite ways" to disrupt, however, provides all the more reason to be concerned about the damaging effects that the majority's decision will have on legitimate law enforcement interests at MSU. By what alternative legal approach does the majority believe that MSU can address these "infinite" forms of disruptions other than by prohibiting "disruptions?" Moreover, the claim that the ordi-

onstrated a realistic danger that MSU Ordinance, § 15.05 will significantly compromise First Amendment freedoms.

An ordinance's enforcement mechanism may also be relevant to whether the ordinance presents a realistic danger of significantly compromising protected expression, as the Court suggested in *Hill*. The Houston ordinance prohibited interrupting police officers, the same class of individuals with the discretionary power to arrest individuals under the ordinance. As the Court explained, "[t]he freedom of individuals verbally to oppose or challenge *police* action without hereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[47] The Court also stated that it has "repeatedly invalidated laws that provide the *police* with unfettered discretion to arrest individuals for words or conduct that annoy or offend *them*."[48] Thus, the Court considered it especially concerning that enforcement of the Houston ordinance was entrusted to the sole objects of its prohibition. This feature of the ordinance presented an " 'opportunity for abuse' " that the Court had previously admonished

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nance *could* be enforced frequently is beside the point if defendant has not demonstrated a likelihood that the ordinance will *actually* be enforced against protected expression and, as I believe, the prohibition against disruptions primarily regulates unprotected activity. There are several laws that are violated numerous times daily on MSU's campus (e.g., laws prohibiting speeding and the possession of alcohol by a minor). The mere prevalence of violations does not make a law constitutionally suspect if the law does not reach a substantial amount of protected expression. Given the majority's focus on the sheer number of violations as a barometer of unconstitutionality, does the majority understand the First Amendment as applying differently at a large campus such as MSU's than at a smaller campus such as Northern Michigan University's?

[47] *Hill*, 482 US at 462-463 (emphasis added).

[48] *Id*. at 465 (emphasis added).

legislators to avoid[49] and made the ordinance "susceptible of regular application to protected expression."[50]

In this case, because the persons protected against disruptions are not limited to the police, there are many circumstances, including this case, under which enforcement of the ordinance is carried out by a neutral third party rather than left to the unfettered discretion of the object of the prohibition. Therefore, even if I were to assume that MSU Ordinance, § 15.05 reaches a substantial amount of protected expression, which I do not, it presents a reduced opportunity for abuse and is less susceptible of regular application to protected expression than the Houston ordinance.[51]

IV. CONSIDERATIONS OF THE ACADEMIC ENVIRONMENT

It is apparently of little consequence to the majority that this case concerns an ordinance adopted by an institution of higher education. To the extent that an academic environment is at issue in this ordinance, it is far more likely that speech-related activities (both inside and outside the classroom) will be the *object* of disruptions than that such activities will be undermined by the *prohibition* against disruptions. In this

[49] *Id*. at 466, quoting *Lewis v New Orleans*, 415 US 130, 136; 94 S Ct 970; 39 L Ed 2d 214 (1974) (Powell, J., concurring in the result).

[50] *Hill*, 482 US at 467.

[51] The majority's claim that the concerns regarding the enforcement mechanism of the Houston ordinance "apply equally" here, *ante* at 78, is flawed. The majority fails to consider the broader legitimate sweep of MSU Ordinance, § 15.05, which protects more than the police. Further, the majority's observation that the ordinance is "a criminal statute that subjects the violator to a misdemeanor conviction and provides someone who *does* have the power to arrest with the opportunity to do so," *ante* at 78, only serves to state the obvious—the police are responsible for enforcing our criminal laws and, of course, even police officers are sometimes the victims of crimes.

way, the ordinance as written may actually serve to promote the dissemination of ideas rather than threaten them.

Further, just as picketing outside courthouses[52] disruptive rallies within libraries,[53] and speech that disrupts the workplace[54] can be constitutionally prohibited, a university can implement measures to prevent disruptions of the academic environment.[55] Even campus newspapers are not entitled to the same degree of

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[52] See *Cameron v Johnson*, 390 US 611, 617; 88 S Ct 1335; 20 L Ed 2d 182 (1968) (upholding a statute that prohibited picketing that "obstructs or unreasonably interferes with ingress or egress to or from the courthouse").

[53] See *Brown v Louisiana*, 383 US 131, 142-143; 86 S Ct 719; 15 L Ed 2d 637 (1966) (suggesting that a state or its instrumentality may prohibit "*disruption*[*s*] of library activities" in a reasonable and nondiscriminatory manner) (emphasis added).

[54] See *Waters v Churchill*, 511 US 661, 680-681; 114 S Ct 1878; 128 L Ed 2d 686 (1994) (explaining that speech by public employees that *disrupts* the workplace is unprotected, regardless of whether the speech is on a matter of public concern).

[55] See *Tinker*, 393 US at 513 (declaring that "conduct by the student, in class or out of it, which for any reason . . . materially *disrupts* classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech") (emphasis added). Although *Tinker* involved high school students, courts have applied *Tinker* in the university setting. For example, in *Salehpour v Univ of Tennessee*, 159 F3d 199, 208 (CA 6, 1998), the United States Court of Appeals for the Sixth Circuit, citing *Tinker*, held that the plaintiff's disruption of the classroom environment at the university was unprotected. The court stated that

> where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to *disrupt* the educational process, such expression is not protected and does violence to the spirit and purpose of the First Amendment. *Tinker*, 393 U.S. at 511. The rights afforded to students to freely express their ideas and views without fear of administrative reprisal, must be balanced against the compelling interest of the academicians to educate in an environment that is free of purposeless distractions

free speech as the *Lansing State Journal* because of the particular mission of the university.[56] By striking down MSU Ordinance, § 15.05, the majority is not only compromising the ability of parking officials to safely respond to irate behavior, but it is also preventing MSU from regulating numerous other disruptive activities that interfere with its core academic mission.

Finally, it is useful to consider the campus disruptions that MSU Ordinance, § 15.05 will no longer cover because it has been partially struck down by the majority: (1) a person running onto the field of a stadium during a sporting event, (2) a person blaring music during a lecture, (3) a person interfering with the progress or movement of an individual cleaning or maintaining a university building, (4) a person prevent-

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> and is conducive to teaching. Under the facts of this case, the balance clearly weighs in favor of the University. [*Id*. (emphasis added; citation omitted).]

Furthermore, the United States Supreme Court, in recognition of its decision in *Tinker*, stated that

> [a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. [*Widmar v Vincent*, 454 US 263, 268 n 5; 102 S Ct 269; 70 L Ed 2d 440 (1981).]

In this case, MSU has implemented a reasonable, content-neutral regulation that is consistent with its mission as an educational institution. The regulation prohibits disruptions to the normal activity of persons carrying out a service, activity, or agreement for or with MSU.

[56] See *Hazelwood Sch Dist v Kuhlmeier*, 484 US 260, 273; 108 S Ct 562; 98 L Ed 2d 592 (1988) ("hold[ing] that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

ing the entrance of students into a classroom by physically blocking the classroom door, (5) a person shining a laser pointer during a performance or lecture, (6) a person turning the lights on and off in a classroom during an exam, (7) a person continually making noise in the library, (8) a person calling in a false bomb threat, and (9) a person pulling a fire alarm in the absence of a fire emergency. These are just a few of the countless nonexpressive campus occurrences that might throw into confusion or disorder the normal activity of a protected person. These illustrations highlight the tangible consequences of the majority's decision.[57]

V. CONCLUSION

For the foregoing reasons, I conclude that *Hill* provides insufficient grounds for this Court to invalidate MSU Ordinance, § 15.05. At best, *Hill* supports the conclusion that the ordinance reaches less protected expression and presents less danger of compromising First Amendment freedoms than the Houston ordinance. I also consider it significant that this ordinance

[57] As another consequence, the majority's decision may well invalidate several other campus prohibitions. MSU Ordinance, § 15.01 prohibits "any excessive noise or disturbance, riot, raid, or *disruption* . . . which obstructs the free movement of persons about the campus or the free and normal use of University buildings and facilities, or prevents or obstructs the normal operations of the University" (emphasis added); MSU Ordinance, § 15.02 provides that "[n]o person shall *disrupt* the normal operation of any properly authorized class, laboratory, seminar, examination, field trip, or other education activity of the University" (emphasis added); and MSU Ordinance, § 15.03 provides that "[n]o person shall *disrupt* the normal use of any campus building or area which has been assigned or scheduled by appropriate means for educational or extracurricular activities" (emphasis added). These ordinances not only illustrate the range of laws that might be placed at risk by the majority in the very limited context of this one university, but also, each of these ordinances is relatively clear in communicating a sense that a "disruption" is distinct from a mere "interruption."

was adopted by an academic institution. Because *Hill* provides the sole basis for defendant's overbreadth challenge, I do not believe that defendant has met his burden in this case. Accordingly, I dissent from the majority opinion and would instead affirm the judgment of the Court of Appeals, which upheld MSU Ordinance, § 15.05 as constitutional on its face and remanded the case to the circuit court for consideration of defendant's as-applied challenge.

MARKMAN, J., concurred with ZAHRA, J.

PEOPLE v KOWALSKI

Docket No. 141932. Argued November 9, 2011 (Calendar No. 7). Decided July 30, 2012.

Jerome W. Kowalski was charged in the Livingston Circuit Court with murdering his brother and sister-in-law after having confessed to the crimes during the last of four police interrogations. The court, Theresa M. Brennan, J., denied defendant's pretrial motion to suppress his statements to the police. Defendant then filed a notice of intent to call two expert witnesses: Dr. Richard Leo, a social psychologist who proposed to testify about the phenomenon of false confessions and the interrogation techniques and psychological factors that tend to generate them, and Dr. Jeffrey Wendt, a clinical and forensic psychologist who, having performed tests on defendant, proposed to testify that his psychological characteristics and the circumstances of his confession were consistent with the literature on false confessions. The court granted the prosecution's motion to exclude this testimony under MRE 702, ruling that Leo's testimony was unreliable and would not assist the trier of fact and, further, that any probative value of Leo's testimony was outweighed by the danger of unfair prejudice under MRE 403. The court also ruled that the exclusion of Leo's testimony required the exclusion of Wendt's testimony. Defendant was granted interlocutory leave to appeal the court's decision. The Court of Appeals, BANDSTRA, P.J., and FORT HOOD, J. (DAVIS, J., concurring in part and dissenting in part), affirmed in an unpublished opinion per curiam issued August 26, 2010 (Docket No. 294054), holding that Leo's testimony would not have involved a proposition that was outside the common knowledge of a layperson; that Wendt's testimony would not have assisted the trier of fact because it related to witness credibility, which is within the sole province of the jury; and that the circuit court's reliability determinations were not an abuse of discretion. The Court of Appeals also agreed that their testimony was inadmissible under MRE 403. Finally, the Court of Appeals rejected defendant's claim that excluding the testimony violated his constitutional right to present a defense. The Supreme Court granted defendant's application for leave to appeal. 489 Mich 858 (2011).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justice ZAHRA; an opinion by Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY; and an opinion by Justice MARKMAN, the Supreme Court *held*:

The circuit court did not abuse its discretion by excluding the expert testimony regarding police-interrogation techniques on the basis of its determination that the testimony was not reliable.

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justice ZAHRA, and an opinion by Justice MARKMAN, the Supreme Court *held*:

The circuit court did not abuse its discretion by excluding the expert testimony regarding false confessions on the basis of its determination that the testimony was not reliable and thus was inadmissible under MRE 702. The exclusion of the proposed expert testimony did not violate defendant's constitutional right to present a defense.

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justice ZAHRA, and an opinion by Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, the Supreme Court *held*:

The circuit court erred by ruling that the proposed testimony regarding the phenomenon of false confessions involved a matter that was not beyond the common knowledge of the average juror because false confessions are inconsistent with the commonsense intuition that a reasonable person would be expected to lie, if at all, only in his or her own favor. Remand to the circuit court was necessary for it to separately consider whether Wendt's proffered testimony regarding defendant's psychological characteristics was admissible.

Affirmed in part, reversed in part, and remanded to the circuit court for further proceedings.

Justice MARY BETH KELLY further stated in the lead opinion that a court evaluating proposed expert testimony under MRE 702 must ensure that it will assist the trier of fact to understand a fact in issue, will be provided by an expert qualified in the relevant field of knowledge, and is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case. She stated that this threshold inquiry is not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror and would limit the admissibility of expert testimony about false confessions to exclude commenting on or vouching for a defendant's veracity. She stated that the circuit court had reasonably determined that

Leo's data sources were unreliable because they were prone to inaccuracy or bias and most had not been peer-reviewed and that the manner in which Leo interpreted and extrapolated from those data resulted in conclusions consistent with his own beliefs rather than testable results. She further stated that the portion of Wendt's testimony indicating that defendant's confession was consistent with this literature was properly excluded because it relied on the same unreliable foundation as Leo's testimony. With respect to Wendt's testimony regarding defendant's psychological characteristics, because the claim of a false confession is beyond the common knowledge of the ordinary person, expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702, and as a result the trial court should have applied the remainder of the MRE 702 factors and properly analyzed the testimony under MRE 403, which considers whether the probative value is substantially outweighed by the danger of unfair prejudice. Justice KELLY also concluded that a proper application of MRE 702 would not violate a defendant's Sixth Amendment right to present a defense because the United States Constitution permits courts to exclude evidence that is only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues and evidence that fails to meet the requirements of MRE 702 will always fall into this category.

Justice CAVANAGH further stated that appellate review of whether a trial court's decision to exclude evidence resulted in an abuse of discretion requires an examination of the importance of the testimony to a defendant's theory of defense, noting that Leo's proposed testimony raised a close question under the current evidentiary rule. While he found persuasive the principles espoused in the dissenting portion of the Court of Appeals' opinion, he agreed that it was prudent to remand this case to the trial court to consider the admissibility of Wendt's testimony. However, he urged the trial court to conscientiously consider the relationship between the evidentiary rules and defendant's constitutional right to present a defense because, when the accuracy of a potential conviction rests in large part on the accuracy of a confession, a trial court should give due consideration to the importance of a defense theory that seeks to undermine the accuracy of the confession.

Justice MARKMAN would have further held that because Leo's testimony regarding the existence of false confessions does not pertain to matters beyond the common knowledge of the average juror, expert testimony on the subject was inadmissible under MRE 702, and that Wendt's testimony concerning defendant's psychological characteristics was irrelevant and thus inadmissible under MRE

702 because, as Wendt admitted, none of those characteristics made it more probable or less probable that defendant's confession was either true or false. He further stated that making commonsense credibility determinations has always been at the heart of the jury's role and that this core responsibility should not be eroded by a growing role for psychological expert testimony that will result in issues of credibility turning increasingly on the outcome of a battle among experts. Accordingly, because the trial court did not abuse its discretion by excluding the expert testimony, he would have affirmed the judgment of the Court of Appeals.

EVIDENCE — EXPERT TESTIMONY — FALSE CONFESSIONS — ADMISSIBILITY — RIGHT TO PRESENT A DEFENSE.

Expert testimony regarding the phenomenon of false confessions and how a defendant's psychological makeup might have affected his or her statements pertains to a matter that is beyond the understanding of the average juror and might be relevant to the reliability and credibility of a confession.

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MARY BETH KELLY, J. This case requires that we determine whether expert witness testimony regarding interrogation techniques and psychological factors claimed to generate false confessions is admissible under MRE 702 and MRE 403 and whether exclusion of this testimony violates the Sixth Amendment right to present a defense. The circuit court excluded the testimony of two experts regarding the occurrence of false confessions and the police interrogation techniques likely to generate them as well as the psychological characteristics of defendant that allegedly made him more susceptible to these techniques.

We hold that the circuit court did not abuse its discretion by excluding the expert testimony regarding the published literature on false confessions and police interrogations on the basis of its determination that the testimony was not reliable, even though the subject of the proposed testimony is beyond the common knowledge of the average juror. We also hold, however, that the circuit court abused its discretion by excluding the proffered testimony regarding defendant's psychological characteristics because it failed to consider this evidence separately from the properly excluded general expert testimony and therefore failed to properly apply both MRE 702 and MRE 403 to that evidence. Accordingly, we remand this case to the circuit court for it to determine whether evidence of defendant's psychological characteristics is sufficiently reliable for admissibility under MRE 702. We further hold that the circuit court's application of MRE 702 did not violate defendant's constitutional right to present a defense.

I. FACTS AND PROCEDURAL HISTORY

In May 2008, the brother and sister-in-law of defendant, Jerome Walter Kowalski, were found dead in their

home. Defendant was charged with both murders. Testimony elicited at defendant's preliminary examination and *Walker*[1] hearing indicates that police questioned defendant about the killings four times over the course of several days: first at defendant's home, next at the Brighton Police Station, then at the Ann Arbor Police Department, and finally at a Michigan State Police post.

During the third interview session, defendant acquiesced to the interviewer's statement that there was a "fifty percent chance [he killed his brother], but a fifty percent chance [he] didn't." Defendant discussed having a "blackout" and "blurred" memory and stated, "I thought I had a dream Thursday, but it was the actual shooting."

Defendant confessed to the murders during the last interview session, which followed a night in jail. Defendant stated that he went to his brother's home, walked into the kitchen, and murdered his brother and sister-in-law after a brief verbal exchange. The record suggests that defendant initially described shooting his brother in the chest from a distance of several feet, although he eventually changed his account after a detective illustrated through role-playing that defendant's first version of events did not corroborate the evidence recovered from the victims' house. At this point in the pretrial proceedings, defendant's confession is the primary evidence implicating him in the murders.

Before trial, defendant filed a motion to suppress his statements to the police, which the circuit court denied after conducting a *Walker* hearing. Defendant then filed a notice of intent to call two expert witnesses. Dr. Richard Leo, a social psychologist, would testify regard-

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

ing police interrogation techniques and the existence of false confessions. Dr. Jeffrey Wendt, a clinical and forensic psychologist, proposed to testify about the psychological testing he performed on defendant and offer his opinion about defendant's mental state during police questioning. Wendt would also offer testimony that the "circumstances of Mr. Kowalski's confession were consistent with the literature on false confessions" and that the interaction between defendant and police "was consistent with a coerced internalized confession."

The prosecutor moved to exclude this proposed expert testimony, arguing that it was inadmissible under MRE 702. Both experts testified at a *Daubert*[2] hearing. Leo explained that his research classified each confession he believed to be false as either a "proven false" confession, a "highly probable false" confession, or a "probable false" confession.[3] This categorization involved comparing the narrative of a defendant's confession with other evidence, checking whether the confession led to independent evidence, and looking for other indicia of reliability, with a researcher determining

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[2] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[3] Leo's research classifies a confession as "proven false" if "it can be objectively established that the suspect confessed to a crime that did not happen," that "the defendant could not have committed the crime," that "the true perpetrator of a crime is identified and his guilt can be objectively established," or that "scientific evidence—in recent years, most commonly DNA evidence—dispositively establishes the false confessor's innocence." Drizin & Leo, *The problem of false confessions in the post-DNA world*, 82 NC L R 891, 925-926 (2004). Confessions are classified as "highly probable false" if the researchers are satisfied that the confessor's innocence was established "beyond a reasonable doubt" and "probable false" if the researchers are satisfied the confessor's innocence was established only by a "preponderance of the evidence." Leo & Ofshe, *The consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation*, 88 J Crim L & Criminology 429, 436-437 (1998).

whether the confession fell into one of the three categories of false confessions.[4] While some of the facts involved in this analysis came "directly from case files," many were gleaned from secondary sources, including popular media accounts.[5] In addition to classifying confessions by his confidence in their falsity, Leo also classified confessions as "voluntary false confessions," "stress-compliant false confessions," "coerced-compliant false confessions," "coerced-persuaded false confessions," or "non-coerced-persuaded false confessions."[6] Leo categorized each confession in this manner by comparing the circumstances of each confession with those of other confessions he had already determined to be false.

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[4] *Id*. at 438-440.

[5] See *id*. at 456 n 199, 457 n 203, 459 n 225, and 461 n 243, citing *Eye To Eye with Connie Chung: Confession* (CBS News Television Broadcast, January 13, 1994); *Page Free After Doing 2½ Years for 1984 Killing of His Girlfriend*, SF Examiner, February 11, 1995, p A5; Carolyn Colwell, *Tankleff's Family: Jury Goofed Relatives Say "Poker Face" Hurt Teen in Murder Trial*, Newsday, July 3, 1990, p 6; *60 Minutes: Richard Lapointe: Did He Do It?* (CBS News Television Broadcast, June 30, 1996).

[6] Leo's research classifies a confession as a "voluntary false confession" when offered "either without police interrogation or in response to minimal police pressure." Leo, *False Confessions: Causes, Consequences, and Solutions*, in Westervelt & Humphrey, eds, *Wrongly Convicted: Perspectives on Failed Justice* (New Jersey: Rutgers University Press, 2001), ch 2, p 42. Confessions are classified as "stress-compliant false confessions" when "the stresses and pressures of custodial questioning overwhelm the suspect and she comes to believe that the only way to terminate the punishing experience of interrogation is by confessing." *Id*. Confessions are classified as "coerced-compliant false confessions" when " 'a suspect confesses in order to escape or avoid an aversive interrogation or to gain a promised reward.' " *Id*. at 43 (citation omitted). Confessions are classified as "coerced-persuaded false confessions" when "the interrogator's use of coercive influence techniques causes [the confessor] to temporarily doubt the reliability of his memory; believe that he probably did, or logically must have, committed the crime under question; and confess to it, despite having no memory or knowledge of participating in or committing the offense. *Id*. "Non-coerced-persuaded false confessions" are similar to coerced-persuaded false confessions but "[are] not elicited in response to coercive interrogation techniques." *Id*. at 44.

On the basis of this research, Leo proposed to testify that "false confessions are associated with certain police interrogation techniques," that "some of those interrogation techniques were used in this case," and that "risk factors associated with false and unreliable confessions, especially persuaded false confessions, were [also] present in this case." In support of Leo's opinions, defendant offered research conducted by Leo and by others. Some of this research appeared in peer-reviewed scientific journals, while some appeared in law reviews, which are not peer-reviewed.

Next, Wendt testified that he had administered a battery of standard psychological tests on defendant, performed an extensive clinical interview of defendant, and reviewed both the police reports recounting the circumstances of defendant's police interrogation as well as the transcripts of those interrogations.[7] Wendt testified that these types of data are routinely used at the Center for Forensic Psychiatry.[8] Wendt then combined all these "data sources" to form a psychological profile, which allowed him to discuss how defendant's traits affected his ability to interact with other people.[9] Lastly, Wendt proposed to testify that "[t]he circum-

[7] The battery of tests included the Personality Assessment Inventory, the Minnesota Multiphasic Personality Inventory, and the Substance Abuse Subtle Screening Inventory.

[8] The Center for Forensic Psychiatry, located outside Ann Arbor, hosts Michigan's only certified forensic facility and conducts all competency and criminal responsibility evaluations ordered in Michigan criminal proceedings.

[9] Specifically, Wendt stated that defendant's

> lack of interpersonal strength or drive leaves him vulnerable to being influenced by others. . . . The combination of his, of his cognitive factors in terms of his anxiety and depression; his interpersonal factors, in terms of his, low assertiveness, leave him particularly vulnerable to suggestion by others and influence by others, particularly people who are in positions of authority.

stances of [defendant's] confession were consistent with the literature on false confessions" and that the interaction between defendant and the police "was consistent with a coerced internalized confession."[10]

At the conclusion of the hearing, the circuit court excluded both experts' proposed testimony. The circuit court ruled that Leo was qualified in terms of knowledge but that his testimony was unreliable and would not assist the trier of fact. The circuit court stated that "the lack of precise information" precluded Leo from measuring the accuracy of his studies and also critiqued the sources underlying Leo's classifications of particular confessions as false:

> [Leo] doesn't . . . have the ability in his studies to review video tapes, which would be reliable. He relies on newspaper accounts, magazine articles. He relies on information provided from sources that are prejudice[d], for example a defense attorney that represented a defendant, [and] advocates against the death penalty. . . . I don't understand why he couldn't have done a [Freedom of Information Act request], police agency files where confessions were given and the suspect was tried or not tried, pull court files, order transcripts, review police records. . . . [This] would be a . . . more reliable methodology.

The circuit court examined the manner in which Leo analyzed the confessions that he determined to be false:

> [Leo] starts with the conclusion that the confession is false and then he works backwards. . . . He doesn't take into consideration why someone might falsely confess, other than because of a police interrogation technique. . . . [A]nd there are reasons why people would falsely confess, they might be trying to protect someone . . . . He hasn't determined a reliable means to have a study group consist of innocent people who wrongfully confess that weren't mentally ill or youth.

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[10] The literature uses the terms "coerced internalized confession" and "coerced-persuaded false confession" interchangeably.

The circuit court criticized this methodology for failing to compare true and false confessions and identify factors that contribute to false confessions but not true confessions. As the circuit court stated, "[I]f true and false confessions can be derived from the same police interrogation techniques, [how] is it possible to blame police interrogation techniques with any degree of reliability?" Given what the circuit court considered to be inadequacies of Leo's data and methodology, the circuit court concluded that Leo's testimony was unreliable.

The circuit court further determined that Leo's testimony would not assist the trier of fact because the jury could evaluate the credibility and reliability of defendant's confession in other ways:

> The video tape will allow the jury to have a first hand view of exactly how the confession was elicited. The jurors will be able to view the police interrogation techniques used. The jury can determine credibility and determine whether the confession is reliable. They have a video. The jurors can figure out if it's a persuaded confession by reviewing the tape and considering if the defendant was able to give facts to the police officer regarding the crime.

Accordingly, the circuit court ruled that Leo's testimony failed to comply with MRE 702.

Finally, the circuit court concluded that Leo's testimony was also properly excluded under MRE 403. The circuit court ruled that the "highly questionable" probative value of Leo's testimony was outweighed by the danger of unfair prejudice because the jury would hear about confessions of defendants with characteristics not present in this case, such as mental illness and youth, and because Leo would describe some confessions as "proven false" when the data did not support that conclusion.

With regard to Wendt's testimony, the circuit court found that the exclusion of Leo's testimony regarding the phenomenon of false confessions also required the exclusion of Wendt's testimony:

> With no other evidence about false confessions, I don't see how this could be relevant, helpful or do anything other than be misleading. . . . What does that do in this case, other than result in misleading evidence, irrelevant evidence, or at least, that probative value would be substantially outweighed by the danger of unfair prejudice.

Defendant sought interlocutory leave to appeal the circuit court's decision excluding the expert testimony. The Court of Appeals stayed the circuit court proceedings, but ultimately affirmed the circuit court in a split decision.[11] The Court of Appeals majority agreed with the circuit court that Leo's testimony would have been unhelpful because it "would not have involved a proposition that was outside the common knowledge of a layperson."[12] The Court of Appeals concluded that the circuit court's reliability determination was not an abuse of discretion, reasoning that Leo had used subjective determinations of which confessions were false, that his methodology could not be subjected to testing, and that no rate of error could be quantified.[13] The Court of Appeals also concluded that the circuit court did not abuse its discretion by determining that Wendt's testimony would not have assisted the trier of fact. The Court of Appeals explained that this testimony related to witness credibility, which is within the sole province of the jury, and that Wendt could not distinguish the characteristics of a person who makes a false confession from the characteristics of a person who

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[11] *People v Kowalski*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2010 (Docket No. 294054).

[12] *Id*. at 3.

[13] *Id.* at 4.

makes a true confession.[14] The Court of Appeals agreed with the circuit court that the danger of unfair prejudice outweighed the probative value of the testimony of both witnesses and that their testimony was inadmissible under MRE 403, reasoning that an opinion on the truthfulness of defendant's confession was implicit in the testimony.[15] Finally, the Court of Appeals rejected defendant's claim that the circuit court had violated his constitutional right to present a defense, explaining that "this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[16]

The Court of Appeals partial dissent would have reversed the circuit court's decision with respect to Leo's testimony regarding "the general fact of false confessions" and with respect to Wendt's testimony to the extent it could stand independently of Leo's.[17] The dissent discussed empirical evidence that jurors "were commonly skeptical of false confessions" and claimed that the majority made "assumptions . . . as to what a layperson may or may not commonly know."[18] The dissent also concluded that Wendt's testimony "that defendant's personality makes him more susceptible to influence than normal is based on reliable methodologies and is highly relevant to explain his mental state as a circumstance attendant to his confession."[19]

Defendant applied for leave to appeal in this Court. We granted leave and instructed the parties to address

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[14] *Id*. at 5.

[15] *Id*.

[16] *Id*. at 3 (quotation marks and citations omitted).

[17] *Id*. at 1-2 (DAVIS, J., concurring in part and dissenting in part).

[18] *Id*. at 2.

[19] *Id*. at 1.

> (1) whether the defendant's proffered expert testimony regarding the existence of false confessions, and the interrogation techniques and psychological factors that tend to generate false confessions, is admissible under MRE 702; (2) whether the probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice; and (3) whether the Livingston Circuit Court's order excluding the defendant's proffered expert testimony denies the defendant his constitutional right to present a defense.[20]

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a circuit court's decision to admit or exclude evidence.[21] An abuse of discretion results when a circuit court selects an outcome falling outside the range of principled outcomes.[22] We review de novo constitutional questions and issues of law underlying evidentiary rulings.[23]

III. ANALYSIS

A. MRE 702

MRE 702 establishes prerequisites for the admission of expert witness testimony.[24] The rule provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experi-

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[20] *People v Kowalski*, 489 Mich 858 (2011).

[21] *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

[22] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[23] *Dep't of Transp v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 134; 700 NW2d 380 (2005); *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

[24] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782, 789; 685 NW2d 391 (2004).

> ence, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable.[25] The overarching goal is "to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[26] Because there are many different kinds of experts and expertise, this inquiry is, by necessity, a flexible one, and a court determining the admissibility of expert testimony may consider reliability factors pertinent to the particular type of expert testimony offered and its connection to the particular facts of the case.[27]

Whatever the pertinent factors may be, however, a court evaluating proposed expert testimony must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case.[28] Although these considerations are separate and distinct and must each be satisfied independently, they are, in

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[25] *Daubert*, 509 US at 589.

[26] *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 152; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

[27] *Daubert*, 509 US at 594-595; *Kumho Tire Co*, 526 US at 149-151 (explaining that a court has considerable leeway in how to decide whether expert testimony is reliable in a particular case depending on the nature of the issue, the expert's expertise, and the subject of the testimony).

[28] MRE 702.

fact, overlapping in nature. For example, "[a]n expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact.' "[29] Likewise, expert testimony without a credible foundation of scientific data, principles, and methodologies is unreliable and, thus, unhelpful to the trier of fact.[30] Indeed, proposed expert testimony must meet all the other requirements of MRE 702 in order to "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."

However, the threshold inquiry—whether the proposed expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue"—is also not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror. Interpreting the nearly identical language in the federal counterpart to MRE 702,[31] the United States Supreme Court explained that helping the trier of fact to "understand the evidence or to determine a fact in issue" presents a question of relevance because " '[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.' "[32] Similarly, if

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[29] *Gilbert*, 470 Mich at 789.

[30] *Id*. at 790, quoting *Zuzula v ABB Power T & D Co*, *Inc*, 267 F Supp 2d 703, 711 (ED Mich, 2003).

[31] FRE 702 stated before its amendment, effective December 1, 2011:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[32] *Daubert*, 509 US at 591, quoting 3 Weinstein & Burger, Weinstein's Evidence, ¶ 702[02], p 702-18. As applied in this case, this threshold determination of relevance has been met, since defendant claims that his

the average juror does not need the aid of expert interpretation to understand a fact at issue, then the proffered testimony is not admissible because "it merely deals with a proposition that is not beyond the ken of common knowledge."[33] These considerations of relevancy and the need for expertise are independent of the other requirements of MRE 702. Thus, even proposed expert testimony that is offered by a qualified expert and based on reliable scientific data and methods may be properly excluded if it is not relevant to the facts of the case or is offered for a proposition that does not require the aid of expert interpretation.

In this case, the Court of Appeals affirmed the circuit court's exclusion of the expert testimony primarily because, in its view, the expert testimony about false confessions "would not have involved a proposition that was outside the common knowledge of a layperson."[34] Thus, we first address whether testimony regarding the phenomenon of false confessions is beyond the factfinder's "ken of common knowledge" before proceeding to the lower courts' application of the additional requirements of MRE 702.

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confession, the primary evidence tying him to the murders, was a false confession of the type that Leo and Wendt study.

[33] *Gilbert*, 470 Mich at 790, quoting *Zuzula*, 267 F Supp 2d at 711. The original Note of the Advisory Committee to FRE 702 recognizes this same principle:

> "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore[, Evidence] §1918.

[34] *Kowalski*, unpub op at 3.

B. FALSE-CONFESSION TESTIMONY AND THE "BEYOND COMMON KNOWLEDGE" REQUIREMENT

As we have explained, whether expert testimony is beyond the ken of common knowledge is a commonsense inquiry that focuses on whether the proposed expert testimony is on a matter that would be commonly understood by the average person.[35] If "the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute," then expert testimony is unnecessary.[36]

Although we have not considered whether the aid of expertise may help a juror to understand the occurrence of false confessions, we have allowed experts to explain other human behavior that is contrary to the average person's commonsense assumptions. In *People v Peterson*, for example, we observed that victims of child sexual abuse sometimes exhibit behavior, such as delayed reporting of abuse or retraction of accusations, that psychologists understand to be common among abuse victims but that jurors might interpret as being inconsistent with abuse.[37] We held that if the victim's

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[35] See, e.g., *Berry v Detroit*, 25 F3d 1342, 1350 (CA 6, 1994) ("If everyone knows [the proposition the expert would testify to], then we do not need an expert because the testimony will not 'assist the trier of fact to understand the evidence or to determine a fact in issue . . . .' "), quoting former FRE 702.

[36] See Note to former FRE 702 as quoted in note 33 of this opinion; see also *Kumho Tire*, 526 US at 149 (noting that expert testimony rests " 'upon an experience confessedly foreign in kind to [the jury's] own' "), quoting Hand, *Historical and practical considerations regarding expert testimony*, 15 Harv L R 40, 54 (1901). As Judge Learned Hand explained, "The whole object of the expert is to tell the jury . . . general truths derived from his specialized experience. . . . It is just because [the jurors] are incompetent for such a task that the expert is necessary at all." Hand, 15 Harv L R at 54.

[37] *People v Peterson*, 450 Mich 349, 363; 537 NW2d 857 (1995).

credibility is attacked by highlighting this behavior, then a qualified expert may explain the consistencies between the behavior of that victim and that of other victims of child sexual abuse. We further explained that such testimony was helpful to address "behavioral traits that may, by their very nature, create confusion in the minds of the jury."[38]

Likewise, in *People v Christel*, we observed that expert testimony is needed when a "witness'[s] actions or responses are incomprehensible to average people."[39] Thus, we permitted a prosecution expert to testify about battered woman syndrome and how a victim of domestic violence might "deny, repress, or minimize the abuse . . . ."[40] We held that this type of testimony was "relevant and helpful when needed to explain a complainant's actions . . . ."[41]

The common theme in these cases is that certain groups of people are known to exhibit types of behavior that are contrary to common sense and are not within the average person's understanding of human behavior. In these instances, an expert's specialized testimony may enlighten the jury so that it can intelligently evaluate an experience that is otherwise foreign.

Although we have not recognized that making a purported false confession constitutes behavior contrary to common sense, the Court of Appeals did so in *People v Hamilton*.[42] In that case, the defendant was

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[38] *Id*. at 375.

[39] *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995).

[40] *Id*. at 585.

[41] *Id*. at 580.

[42] *People v Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987). Multiple federal circuits have acknowledged, at least implicitly, that the average person does not understand why a defendant would make false inculpatory statements and have permitted the admission of expert

charged with felony-murder and other crimes based solely on a confession he had made to the police. The defense theory was that the defendant had not committed the crimes and had falsely confessed. In support, the defendant proffered testimony of a clinical psychologist who would have testified "how defendant's psychological makeup might have affected his statements to the police."[43] The Court of Appeals, citing *Crane v Kentucky*,[44] recognized that a rational juror does not readily understand why a defendant who is innocent might confess to a crime and that expert testimony regarding a defendant's psychological makeup might be relevant to a confession's reliability and credibility. The Court of Appeals, therefore, reversed the lower court's exclusion of the evidence, explaining:

> [E]vidence of the manner in which a confession was obtained may be highly relevant to the confession's reliability and credibility . . . .
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> [The proffered testimony] would help the jury understand the circumstances surrounding defendant's statements to the police and how those circumstances affected the reliability and credibility of defendant's statements.

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testimony bearing on factors that could lead to a false confession. See *United States v Roark*, 753 F2d 991, 994-995 (CA 11, 1985) (holding admissible under FRE 702 "testimony . . . designed to help the trier of fact determine whether it was more or less probable that [the defendant] was somehow psychologically coerced into [confessing]"); *United States v Shay*, 57 F3d 126, 134 (CA 1, 1995) (holding that the district court erred by excluding expert testimony pertaining to the defendant's "mental disorder that caused him to make false statements" because such testimony is contrary to the commonsense assumption that individuals do not falsely confess).

[43] *Hamilton*, 163 Mich App at 663.

[44] *Crane v Kentucky*, 476 US 683, 688-690; 106 S Ct 2142; 90 L Ed 2d 636 (1986).

> Such an understanding is central to the jury's determination of defendant's guilt or innocence.[45]

We agree with *Hamilton* that expert testimony bearing on the manner in which a confession is obtained and how a defendant's psychological makeup may have affected the defendant's statements is beyond the understanding of the average juror and may be relevant to the reliability and credibility of a confession.[46]

In the instant case, however, the Court of Appeals, like the circuit court, held that the proffered testimony about false confessions "would not have involved a proposition that was outside the common knowledge of a layperson"[47] because the jury could perform its own analysis of defendant's inculpatory statements. Certainly, we have no disagreement with the premise that issues involving credibility and the weight of the evidence are within the province of the jury. However, the Court of Appeals' analysis wrongly focused on the jury's role, which is not part of the MRE 702 analysis, rather than on what knowledge the common person possesses and whether the aid of specialized knowledge can help a juror understand a fact at issue. Like the behavior of the child sexual abuse and domestic violence victims in *Peterson* and *Christel*, a purported false confession of

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[45] *Hamilton*, 163 Mich App at 666-667.

[46] The circuit court and Court of Appeals, like the dissent, distinguished *Hamilton*, in part, on the ground that it was decided before MRE 702 incorporated the *Daubert* standards. The Court of Appeals reasoned that under earlier MRE 702 analysis, "the trial court was not required to make a 'searching inquiry' into the reliability of the proffered expert's testimony by analyzing the expert's methodologies and principles." *Kowalski*, unpub op at 6. However, *Hamilton*'s reasoning regarding whether expert testimony was beyond the average person's common knowledge was unchanged by *Daubert* and is still instructive on that point. We address the issue of reliability separately.

[47] *Kowalski*, unpub op at 3.

the sort in *Hamilton* constitutes counterintuitive behavior that is not within the ordinary person's common understanding, and thus expert assistance can help jurors understand how and why a defendant might confess falsely.[48] The exclusion of such expert testimony when it meets all the requirements of our evidentiary rules could, in some instances, hinder the jury in its task because without the enlightenment of expert opinion the jury's ultimate determination may not be arrived at intelligently.

Our conclusion that a confession challenged as false constitutes behavior contrary to common sense finds additional support in a longstanding presumption deeply rooted in our country's legal system: A person does not ordinarily make untruthful incriminating statements. As the United States Supreme Court explained more than 100 years ago, confessions are given great weight on the basis of the presumption that "one who is innocent will not imperil his safety or prejudice his interests by an untrue statement . . . ."[49] Our "state-

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[48] The dissent attempts to diminish the significance of *Peterson* and *Christel* by suggesting that they do not support our holding, in part because they were decided before the amendment of MRE 702 to conform to *Daubert*. The amendment, however, is irrelevant because it did not affect the inquiry whether expert testimony is beyond the average person's common knowledge. The dissent further attempts to distinguish *Peterson* and *Christel* on the basis that the phenomenon of a false confession is a "commonplace circumstance[]" that jurors are well equipped to understand, unlike "the extraordinary relationships of the sexually abused child and the battered woman . . . ." *Post* at 164-165. However, this assertion unreasonably assumes that the ordinary juror has the "life's experience to comprehend," *post* at 164-165, the circumstances of police interrogation—circumstances typically experienced only by those accused of criminal conduct—and the effect of a defendant's particular psychological traits on the outcome of the interrogation. The distinctions drawn by the dissent are therefore unavailing.

[49] *Hopt v People of the Territory of Utah*, 110 US 574, 585; 4 S Ct 202; 28 L Ed 262 (1884); see also *Crane*, 476 US at 689 (recognizing that

ment against interest" exception to the hearsay rule embodies this presumption and allows the admission of hearsay statements, which are typically considered untrustworthy, if the statement tended to subject the declarant to criminal liability, so "that a reasonable person . . . would not have made the statement unless believing it to be true."[50] The premise underlying this hearsay exception is "the common-sense intuition that a reasonable person would be expected to lie, if at all, only in his own favor, and would not harm himself by his own words."[51] Despite this well-established, commonsense presumption, embodied in our evidentiary rules, that a person does not make false incriminating statements, both the Court of Appeals and the circuit court simply presumed that the average juror possessed the knowledge to evaluate factors that might lead to a

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rational jurors attach credibility to a defendant's confession because an innocent defendant would not admit guilt).

[50] MRE 804(b)(3). This presumption is also embodied in the rules of evidence in many other states. See Alas R Evid 804(b)(3); Ariz R Evid 804(b)(3); Ark R Evid 804(b)(3); Cal Evid Code § 1230; Del R Evid 804(b)(3); Fla Stat 90.804(2)(c); Ga Code Ann 24-8-804(b)(3) (effective until January 1, 2013); Hawaii R Evid 804(b)(3); Idaho R Evid 804(b)(3); Iowa R Evid 5.804(b)(3); La Code Evid 804 (B)(3); Minn R Evid 804(b)(3); Miss R Evid 804(b)(3); Mont R Evid 804(b)(3); Neb Rev Stat 27-804(2)(c); Nev Rev Stat 51.345; NH R Evid 804(b)(3); NJ R Evid 803(c)(25); Okla Stat tit 12, § 2804(B)(3); Or Rev Stat 40.465(3)(c); RI R Evid 804(b)(3); SC R Evid 804(b)(3); SD Codified Laws 19-16-32; Tenn R Evid 804(b)(3); Vt R Evid 804(b)(3); W Va R Evid 804(b)(3); Wis Stat 908.045(4); Wyo R Evid 804(b)(3); see also *People v Ennis*, 11 NY3d 403, 413; 872 NYS2d 364; 900 NE2d 915 (2008) ("To qualify under [the declarations against penal interest exception to the hearsay rule], the declarant must be unavailable, must have competent knowledge of the facts and must have known at the time the statement was made that it was against his or her penal interests . . . ."); *State v Zerban*, 412 SW2d 397, 399-400 (Mo, 1967) ("[I]f he made any incriminating statements, untrue denials evincing a consciousness of guilt, they would constitute admissions against interest and be admissible in evidence.").

[51] *People v Watkins*, 438 Mich 627, 636; 475 NW2d 727 (1991).

false confession. This conclusion is not grounded in the necessary commonsense inquiry and lacks any legal basis.

Accordingly, we hold that because the claim of a false confession is beyond the common knowledge of the ordinary person, expert testimony about this phenomenon is admissible under MRE 702 when it meets the other requirements of MRE 702. We caution, however, that like other expert testimony explaining counterintuitive behavior, the admissibility of expert testimony pertaining to false confessions is not without limitations. An expert explaining the situational or psychological factors that might lead to a false confession may not "comment on the . . . truthfulness" of a defendant's confession,[52] "vouch for the veracity" of a defendant recanting a confession,[53] or "give an opinion as to whether defendant was telling the truth when he made the statements to the police."[54] These conventional limitations are necessary to guard against the potential for jurors to view the expert "not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of" defendants subject to police interrogation, but also as "possess[ing] some specialized knowledge for discerning the truth."[55] Given the availability of these conventional limitations, we—unlike the Court of Appeals, which viewed the expert testimony as tantamount to testimony that defendant's confession was false—are less pessimistic

[52] See *Christel*, 449 Mich at 580.

[53] See *Peterson*, 450 Mich at 352.

[54] See *Hamilton*, 163 Mich App at 669.

[55] *People v Beckley*, 434 Mich 691, 727-728; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.). Additionally, and should the parties request it, a circuit court may provide, as an added safeguard against this potential danger, a limiting instruction directing the jury to consider the testimony only for its intended and limited purpose.

about the circuit court's management of the proposed testimony and the jury's capability to properly evaluate and assess the testimony in light of all the evidence submitted at trial.[56]

In this case, the proposed testimony of both experts regarding the phenomenon of false confessions and Wendt's testimony regarding defendant's psychological characteristics would explain a proposition that is beyond the ken of common knowledge. Thus, the lower courts erred to the extent that they excluded the evidence solely on the basis that it "merely deals with a proposition that is not beyond the ken of common knowledge."[57]

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[56] The Court of Appeals concluded that an unavoidable inference would be drawn from the expert testimony that defendant falsely confessed or that the testimony would, at least, "directly [imply] that the police influenced [defendant] into making a false confession." *Kowalski*, unpub op at 6. The possibility that the jury might draw a particular conclusion from the expert testimony, or that a party might argue that a particular conclusion should be drawn from that testimony, does not mean that the expert himself is implying what conclusion should be drawn. Otherwise, we would have excluded the proposed expert testimony in *Peterson* and *Christel* on the grounds that the testimony itself would imply that the victims had, in fact, been abused. We rejected this argument in *Peterson* and *Christel* and we reject it again here.

The dissent also dismisses these safeguards as ineffective, claiming that an expert on false confessions is akin to a "human lie detector" whose testimony will almost certainly cause jurors to casually abandon their role of assessing witness credibility. *Post* at 160 (quotation marks and citation omitted). This analogy is inapt because the "aura of infallibility" surrounding polygraph evidence—which is derived from a physiological test to determine whether a person is lying—is not attendant to experts testifying about the phenomenon of false confessions and defendants' psychological traits. *Post* at 160 (quotation marks and citation omitted). Further, we assume that "jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and we must consider the extent to which a juror has the ability both to follow those instructions and to autonomously assess the credibility of the expert's testimony in light of all the other evidence produced at trial.

[57] *Gilbert*, 470 Mich at 790.

C. ADDITIONAL REQUIREMENTS OF MRE 702

Our conclusion in this regard does not end our analysis. We must still consider the other requirements of MRE 702 before determining whether the circuit court's ultimate conclusion to exclude the proposed testimony amounted to an abuse of discretion. As we have explained, the testimony of Leo and Wendt is admissible under MRE 702 if it meets the other requirements of the evidentiary rule: the "witness [is] qualified as an expert by knowledge, skill, experience, training, or education," the "testimony is based on sufficient facts or data," the "testimony is the product of reliable principles and methods," and the "witness has applied the principles and methods reliably to the facts of the case."[58] When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known.[59] This analysis requires courts to ensure that "each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable."[60]

Here, the expert testimony consists of two distinct categories: testimony by Leo and Wendt regarding the general phenomenon of false confessions and testimony

[58] MRE 702.

[59] *Daubert*, 509 US at 593-594. These factors are typically referred to as the "*Daubert* factors," but, as explained in note 27 of this opinion and the accompanying text, a court has great leeway to consider additional, or other, factors pertinent to the particular area of expertise. All the *Daubert* factors are pertinent in this case because, as in *Daubert*, the expert testimony pertains to scientific theories and techniques.

[60] *Gilbert*, 470 Mich at 779.

by Wendt regarding his clinical psychological examination of defendant. We address each category in turn as it relates to the remaining requirements of MRE 702.

1. GENERAL TESTIMONY ABOUT FALSE CONFESSIONS

Both Leo and Wendt proposed to offer testimony based on research and literature about the phenomenon of false confessions. Leo proposed to testify that false confessions existed, that certain psychological interrogation techniques commonly employed by the police sometimes resulted in false confessions, and that some of those techniques were used in this case. Wendt proposed to build on this foundation and testify that "[t]he circumstances of [defendant's] confession were consistent with the literature on false confessions" and that the interaction between defendant and the police "was consistent with a coerced internalized confession."

With regard to Leo, the circuit court followed the mandate of MRE 702 and carefully reviewed all the stages of Leo's research, starting with his data.[61] The circuit court noted that Leo decided whether a confession was false on the basis of information he gathered from sources such as newspaper accounts and attorneys representing the confessors. The circuit court questioned the accuracy and potential bias of these sources and even offered an alternative method of obtaining more authoritative documentation through Freedom of Information Act requests.

Next, the circuit court identified multiple problems with the analysis Leo applied to his data. Among the circuit court's observations was that Leo "starts with the conclusion that the confession is false and then he

[61] The parties do not dispute the circuit court's ruling that Leo is qualified as an expert in this field.

works backwards" to find commonalities. The circuit court concluded that, rather than yielding factors common to all false confessions, Leo's method seemed to yield only factors common to confessions Leo *believed* to be false. This also made it impossible to test Leo's research or compute its rate of error. The circuit court also noted that because Leo did not have a "reliable means to have a study group" that excluded extraneous factors, he had "no ability to estimate the frequency of false confessions." The circuit court found troubling the number of confessions in Leo's studies that involved factors not present in this case, such as a defendant's youth or mental incapacity. Finally, the circuit court was troubled by a lack of "a random sample of confessions, true and false."

Nothing in the circuit court's analysis placed the exclusion of Leo's testimony outside the range of principled outcomes.[62] The circuit court properly considered all stages of Leo's analysis and found it unreliable at every stage. With regard to the data underlying Leo's testimony, the circuit court reasonably determined that its sources were unreliable because they were prone to inaccuracy or bias and, in nearly all instances, had not been subjected to the rigorous standards of scientific peer-review. Additionally, the circuit court raised multiple legitimate concerns about the "manner in which [Leo] interpret[ed] and extrapolate[d] from those data." The unreliable methodology, as the circuit court described, resulted in conclusions consistent with Leo's own preconceived beliefs rather than testable results consistent with an objective, scientific process. Therefore, because the exclusion of Leo's testimony was a reasonable and principled outcome, the circuit court's decision did not amount to an abuse of discretion. The

[62] *Babcock*, 469 Mich at 269.

Court of Appeals came to the same conclusion after making similar observations about the data and methods underlying Leo's studies, and we thus affirm the lower courts' decisions to exclude Leo's testimony.[63]

Further, because the circuit court and Court of Appeals properly excluded Leo's testimony pertaining to the literature of false confessions, they were also correct to exclude the portion of Wendt's testimony indicating that defendant's confession was consistent with this literature.[64] This part of Wendt's testimony obviously relied on the same unreliable foundation that we have rejected with respect to Leo's testimony. Thus, we cannot conclude that the lower courts committed an abuse of discretion by excluding this portion of Wendt's testimony and we affirm their decisions to exclude it.

Our decision to uphold the exclusion of the testimony based on false-confession literature is supported by *Vent v State*,[65] in which the Alaska Court of Appeals also upheld the exclusion of testimony by Leo that was very similar to the testimony he offered in the instant case. Like the circuit court here, the *Vent* court was "troubled by the fact that there was no way to quantify or test Dr. Leo's conclusions that certain techniques might lead to false confessions."[66] The *Vent* court explained that while some courts allow testimony of this sort, many have held that it is not an abuse of discretion to exclude it.[67]

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[63] The dissent would also exclude Leo's testimony under MRE 403. Because we have concluded that the circuit court did not abuse its discretion by excluding Leo's testimony under MRE 702, we need not examine whether MRE 403 also allows for the testimony's exclusion.

[64] The parties do not dispute that Wendt is qualified as an expert.

[65] *Vent v State*, 67 P3d 661, 667-670 (Alas App, 2003).

[66] *Id*. at 669.

[67] See, e.g., *Edmonds v State*, 955 So 2d 787 (Miss, 2007) (affirming the circuit court's decision excluding an expert's false confession testimony); *Green v State*, 55 SW3d 633, 640 (Tex App, 2001) (affirming the trial

Ultimately, the *Vent* court concluded that there was "merit to [the Alaska superior court's] questions concerning Dr. Leo's methodology . . . ."[68] We have reached the same conclusion with regard to both experts' testimony relating to the literature of false confessions.[69] However, this conclusion does not end our inquiry because Wendt's testimony also encompassed a second category: evidence of his psychological testing of defendant.

2. PSYCHOLOGICAL-TESTING EVIDENCE

Wendt also proposed to testify regarding defendant's psychological profile, which he constructed from psychological tests and clinical interviews of defendant. The circuit court excluded the entirety of Wendt's testimony, reasoning that, without the evidence about false confession literature, his testimony on this subject would not assist the trier of fact. This conclusion was based on the erroneous premise that this portion of Wendt's testimony was somehow dependent on false-confession research for its reliability. The record establishes, however, that this portion of Wendt's testimony is, in fact, independent of the false-confession literature and was offered to illustrate a separate, but related, point regarding Wendt's specific study of defendant

court's decision excluding an expert's false confession testimony); *United States v Griffin*, 50 MJ 278, 284 (CA AF, 1999) (holding that the testimony of a defense expert on false confessions was properly excluded as not sufficiently reliable); *Kolb v State*, 930 P2d 1238 (Wy, 1996) (affirming the exclusion of expert false confession testimony).

[68] *Vent*, 67 P3d at 670.

[69] Our decision in this regard does not deprive defendant of his theory of the case: that he falsely confessed. Defendant may cross-examine the police officers about their training regarding interrogation techniques and the methods they used in this case and may argue from this testimony that his confession was false.

himself.[70] Wendt testified at length about the data he had gathered from an array of psychological tests he performed on defendant, his clinical interviews of defendant, and his review of the transcripts of defendant's interrogation. Wendt also explained the methods he applied to this data, how he compiled a psychological profile, and what opinions he formed from this analysis.

This is exactly the type of expert testimony regarding defendant's psychological profile that may "assist the trier of fact" within the meaning of MRE 702. Consequently, the circuit court abused its discretion by excluding this testimony on the basis of the absence of testimony about the false-confession literature. Because the circuit court did not apply the remaining MRE 702 factors to this second aspect of Wendt's testimony, we do not hold that the circuit court is required to admit Wendt's testimony, only that its basis for excluding Wendt's testimony amounted to an abuse of discretion. On remand, it remains the circuit court's duty to fulfill its gatekeeper role under MRE 702 with respect to any proposed expert testimony.[71]

Further, although the circuit court did not complete its analysis under MRE 702, it also opined that Wendt's testimony was properly excluded under MRE 403. We conclude that the circuit court's analysis of MRE 403 was similarly faulty. MRE 403 excludes relevant evidence only if "its probative value is substantially out-

[70] The Court of Appeals also excluded the entirety of Wendt's testimony because it would be unhelpful. The Court's analysis is similarly faulty because, like the circuit court, the Court of Appeals failed to recognize that this part of Wendt's testimony is independent of the other testimony regarding false-confession literature.

[71] The dissent opines that Wendt's testimony regarding the psychological tests he performed is "irrelevant," *post* at 156, but as we have explained it is unnecessary to reach this issue because this determination is to be made by the circuit court on remand.

weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."[72] Evidence is unfairly prejudicial when "there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury."[73] In this case, the circuit court reasoned, "With no other evidence about false confessions, I don't see how this could be relevant, helpful or do anything other than be misleading," and concluded that its "probative value would be substantially outweighed by the danger of unfair prejudice." Thus, the circuit court ruled that Wendt's testimony had no probative value in the absence of the testimony about false-confession literature.[74] We have explained that testimony like that Wendt proposed to offer can provide guidance to a fact-finder regarding behavior that would seem counterintuitive to a juror. Accordingly, and if the proposed testimony otherwise meets the requirements of MRE 702, the circuit court must consider this benefit in assessing the probative value of

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[72] MRE 403.

[73] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (emphasis added).

[74] The Court of Appeals' MRE 403 analysis also found that all the proffered expert testimony generally had little probative value and a danger of high prejudice because, in its view, the expert testimony "would interfere with the jury's role in determining the credibility and weight of the confession." *Kowalski*, unpub op at 5. This analysis does not take account of safeguards typically applied to expert testimony in similar contexts. In *Peterson* we observed that an expert may not "vouch for the credibility of a witness" and that a limiting instruction could ensure the jury used the testimony only for its proper purpose. *Peterson*, 450 Mich at 376. Similarly, in *Christel*, we observed that an expert is prohibited from "comment[ing] on the complainant's truthfulness." *Christel*, 449 Mich at 580. As we have explained, these same limitations apply to the expert testimony here, and a limiting instruction is available should the parties request it. Thus, the Court of Appeals' analysis is deficient because it failed to consider the safeguards that might negate the danger that the expert testimony will interfere with the jury's role.

the testimony. Because it failed to weigh Wendt's testimony on the probative side of the analysis, the circuit court abused its discretion by excluding the evidence under MRE 403.

Again, we do not hold that the circuit court is required to admit this portion of Wendt's testimony, just that it misapplied MRE 403 in excluding the testimony. However, in applying MRE 403 on remand, the circuit court must also consider whether the limits that this Court imposes on expert testimony of this nature and the possibility of a limiting jury instruction reduce the danger of any unfair prejudice.[75]

Accordingly, we reverse the portions of the Court of Appeals' judgment and the circuit court order excluding the expert testimony regarding Wendt's psychological testing of defendant. On remand, the circuit court must consider whether this testimony meets the requirements of MRE 702 and MRE 403.

D. RIGHT TO PRESENT A DEFENSE

Finally, defendant claims that, to the extent *any* of the proposed expert testimony is excluded, the exclusion violates his right to present a defense. Criminal

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[75] The dissent would exclude all of Wendt's testimony under MRE 403 as a matter of law, arguing that the testimony is not "even 'marginally probative evidence.' " *Post* at 157. It is unnecessary to consider under MRE 403 the portion of Wendt's testimony regarding false-confession literature, because it was properly excluded under MRE 702. Further, because the circuit court must consider the admissibility of the psychological testing evidence under MRE 702 on remand before reaching MRE 403, it is not necessary to conclude, as the dissent does, that this type of testimony is inadmissible under MRE 403 as a matter of law. Moreover, because Wendt's proposed expert testimony might have some probative value, the circuit court must undertake a new analysis of MRE 403 if it concludes on remand that the psychological testing evidence satisfies the requirements of MRE 702.

defendants have a constitutional right to "a meaningful opportunity to present a complete defense."[76] The Sixth Amendment of the United States Constitution provides that a criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor." This right has been incorporated to the states through the Fourteenth Amendment.[77] The Supreme Court of the United States has held: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . ."[78]

The right to present a defense limits the otherwise broad latitude of states to establish rules that exclude evidence from criminal trials.[79] When rules "infring[e] upon a weighty interest of the accused" and are "arbitrary" or "disproportionate to the purposes they are designed to serve," they must yield to the constitutional right.[80] However, while the right to present a defense is a fundamental part of due process, "it is not an absolute right," and "[t]he accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' "[81]

We must therefore determine whether the exclusion of the expert testimony at issue denies defendant his constitutional right to present a defense. To do so, we

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[76] *Crane*, 476 US at 690 (quotation marks and citation omitted).

[77] *Washington v Texas*, 388 US 14, 18; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

[78] *Id.* at 19.

[79] *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998).

[80] *Id.* (quotation marks and citation omitted).

[81] *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

consider the purpose MRE 702 is designed to serve. The purpose of nearly identical FRE 702 is to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[82] In discussing FRE 702, the United States Supreme Court has explained that the inquiry is a "flexible one" and that "[i]ts overarching subject is the scientific validity" of the proposed testimony.[83] The same can be said of MRE 702.[84] Ultimately, courts are vested with the gatekeeping authority to apply MRE 702 on a case-by-case basis.[85]

The *lack* of such discretion is what has most often prompted the United States Supreme Court to strike down evidentiary rules as violative of the Sixth Amendment. In *Rock v Arkansas*, for example, the Court considered a categorical rule prohibiting the consideration of a hypnotically refreshed memory.[86] The Court struck down the rule because it "leaves a trial judge no discretion to admit this testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing."[87] In contrast, every proper application of MRE 702 requires a careful consideration of the reliability of the proffered evidence. The very act of conducting a *Daubert* hearing establishes that a circuit court's gatekeeping role under MRE 702 is neither "arbitrary" nor "disproportionate to the ends [it is] asserted to promote" because "the Constitution permits

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[82] *Daubert*, 509 US at 589.

[83] *Id*. at 594-595.

[84] *Gilbert*, 470 Mich at 781 ("[T]he court's fundamental duty [is to] ensur[e] that *all* expert opinion testimony—regardless of whether the testimony is based on "novel" science—is reliable.").

[85] *Id.* at 779-783.

[86] *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

[87] *Id*. at 56 n 12.

judges to exclude evidence that is . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues"[88] and evidence that fails to meet the requirements of MRE 702 will *always* be only marginally relevant or risk confusing the trier of fact.[89] Consequently, we hold the proper application of MRE 702 in this case to exclude Dr. Leo's testimony and the portion of Dr. Wendt's testimony that would rely on false confession research does not deny defendant his constitutional right to present a defense.

IV. RESPONSE TO THE DISSENT

The dissenting justice's principal disagreement with our decision stems from our view that the phenomenon of false confessions is beyond the average person's common knowledge. The dissent, however, does not dispute that the "statement against interest" exception to the hearsay rule embodies the presumption that a person does not ordinarily make untruthful incriminating statements, which is a strong indicator that the circumstances of a false confession are beyond the average person's understanding. Still, the dissent dismisses the significance of the fact that this presumption

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[88] *Holmes v South Carolina*, 547 US 319, 326-327; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (quotation marks and citations omitted).

[89] Defendant's argument that *Crane v Kentucky*, 476 US 683, prohibits the circuit court from excluding the proffered evidence is without merit. In *Crane*, the United States Supreme Court held that a defendant had a right to argue to a jury that his confession was unreliable even after a judge had determined it to be voluntary. The Court held that excluding all testimony about the circumstances surrounding his confession was a constitutional violation of the defendant's right to present a defense because it excluded "competent, reliable evidence." *Id*. at 690. Yet *Crane* also acknowledged that states may "exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Id*.

is embodied in our rules of evidence as well as the significance of our caselaw recognizing that the aid of expertise can help jurors understand similarly counterintuitive behavior.[90] The dissent also does not dispute that our caselaw indeed permits expert testimony to explain counterintuitive behavior. Instead, the dissent insists that the average person is capable of understanding why a person might falsely confess to a crime and under what circumstances. This argument is unconvincing in part because it relies not on any established legal principles of our jurisprudence but, for the most part, on a law review article authored by a law student and on the concededly unreliable testimony of Leo.

Having posited that jurors can, in fact, understand without the aid of expertise why a person might falsely confess, the dissent supports this view with a list of our holding's supposed ill effects. But the dissent's fears that our decision will cause jurors to subordinate their judgment to the "false appearance of expertise,"[91] "open up the floodgates for expert testimony,"[92] and turn criminal trials into "battles of psychological experts"[93] are simply unfounded. Our holding is limited to the principle that a claim of a false confession is beyond the common knowledge of the ordinary person and that expert testimony regarding this phenomenon is admissible under MRE 702 only if it meets the other requirements of MRE 702. Thus, far from the dissent's interpretation of our decision, we have not created a rule

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[90] Indeed, the dissent cites extensively the views of the dissenting justices in both *Peterson* and *Christel*. While those more narrow viewpoints are undoubtedly aligned with the dissenting justice's views in this case, those views failed to carry the day and are not the law of our state.

[91] *Post* at 148 (emphasis omitted).

[92] *Post* at 166.

[93] *Post* at 166.

allowing the admission of faux expert testimony regarding false confessions. Rather, a defendant proffering expert testimony on the phenomenon of false confessions must meet all the requirements not only of MRE 702, but also of MRE 403 before the testimony could be admitted. Thus, the ramifications the dissent fears—the "routine" use of experts by both the defense and the prosecution, and prolonged and more costly proceedings—are exaggerated. And while there may be some lengthening of the trial process in those few cases in which expert testimony regarding false confessions is admitted, the result is not "gamesmanship" "for no good reason," but an aid in the furtherance of a criminal trial's "principal mission, the search for the truth."[94]

Further, the dissent lists several types of behavior that it believes could be subject to expert testimony as a result of our decision. However, that concern is not supported by today's holding. We agree with the dissent that questions of eyewitness identification, fading memories, witnesses' body language, and the like involve obvious human behavior from which jurors can make "commonsense credibility determinations."[95] None of this behavior is recognized in our law as having special indicia of reliability. A statement against penal interest, on the other hand, is presupposed to be trustworthy and credible, which is precisely why an alleged false confession is a counterintuitive behavior that may, like other counterintuitive behavior recognized by our caselaw, require the aid of expertise to explain. The legal principles that *are* the foundation of our holding do not also support the need for expert testimony to explain the common human behavior described by the dissent.

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[94] *Post* at 148-149.

[95] *Post* at 167-168.

V. CONCLUSION

We affirm the exclusion of Leo's testimony and the portion of Wendt's testimony based on false-confession research because the circuit court's determination that it was not reliable under MRE 702 was not an abuse of discretion and its exclusion does not violate defendant's right to present a defense. Because the circuit court and the Court of Appeals erred by excluding Wendt's testimony regarding the psychological testing he performed on the ground that it depended on the testimony of Leo, we reverse those rulings and remand this case to the circuit court for the court to determine its admissibility under MRE 702 and MRE 403.

YOUNG, C.J., and ZAHRA, J., concurred with MARY BETH KELLY, J.

CAVANAGH, J. (*concurring*). I concur in the result reached by the lead opinion.

I agree with the lead opinion that the phenomenon of false confessions is counterintuitive and, thus, inconsistent with " 'the common-sense intuition that a reasonable person would be expected to lie, if at all, only in his own favor, and would not harm himself by his own words.' " *Ante* at 128, quoting *People v Watkins*, 438 Mich 627, 636; 475 NW2d 727 (1991); see, also, *United States v Shay*, 57 F3d 126, 133 (CA 1, 1995) ("Common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements."); *Crane v Kentucky*, 476 US 683, 689; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (noting the "one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"). Accordingly, I agree with the lead opinion that expert testimony may assist jurors in understanding the exist-

ence of false confessions, including how and why a defendant might falsely confess. *Craig v Oakwood Hosp*, 471 Mich 67, 79; 684 NW2d 296 (2004). Thus, I agree that the lower courts erred in excluding the expert testimony to the extent that they concluded otherwise.

I believe that appellate review of whether a trial court's decision to exclude evidence resulted in an abuse of discretion requires an examination of the importance of the testimony to a defendant's theory of defense. See *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996). At this juncture and under this Court's current evidentiary rule, however, I find that the issue presented in this case raises a close evidentiary question regarding Dr. Richard Leo's proposed testimony. Thus, I agree with the lead opinion's conclusion that the trial court did not abuse its discretion by excluding as unreliable Leo's testimony as it pertains to police-interrogation techniques. *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).

And although I find persuasive the principles espoused by the Court of Appeals partial dissent as it relates to Dr. Jeffrey Wendt, *People v Kowalski*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2010 (Docket No. 294054) (DAVIS J., concurring in part and dissenting in part), I agree with this Court's conclusion that it is prudent to remand this case to the trial court to consider the admissibility of Wendt's testimony in the first instance, in light of the trial court's failure to consider Wendt's testimony independently of Leo's testimony. Nevertheless, on remand, I urge the trial court to "conscientiously consider" the relationship between the evidentiary rules and defendant's constitutional right to present a defense. *Barrera*, 451 Mich at 269. When the accuracy of a potential

conviction rests in large part on the accuracy of a confession, I believe that a trial court should give due consideration to the importance of a defense theory that seeks to undermine the accuracy of the confession.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

MARKMAN, J. (*concurring in part and dissenting in part*). I agree with the lead opinion that (a) the trial court did not abuse its discretion by ruling that Dr. Richard Leo's proffered expert testimony regarding the existence of false confessions and the interrogation techniques claimed to generate them is unreliable and thus inadmissible under MRE 702, (b) for the same reason, to the extent that Dr. Jeffrey Wendt's proffered testimony relied on Leo's false confession testimony, the trial court did not abuse its discretion by excluding this testimony, and (c) the exclusion of this testimony did not violate defendant's Sixth Amendment right to present a defense. However, I respectfully disagree with the lead opinion's conclusions that (a) expert testimony regarding the existence of false confessions, even if reliable, is admissible under MRE 702 because it is beyond the common knowledge of the average juror and (b) Wendt's testimony concerning defendant's psychological characteristics, even if reliable, is relevant and thus admissible under MRE 702. Instead, I conclude that (a) expert testimony regarding the existence of false confessions is not beyond the common knowledge of the average juror and thus is inadmissible under MRE 702 and (b) Wendt's testimony concerning defendant's psychological characteristics is irrelevant because, as Wendt himself admits, none of these characteristics make it "more probable or less probable," MRE 401, that defendant's confession was either true or

false, and thus his testimony is also inadmissible under MRE 702. In other words, I conclude that the trial court did not abuse its discretion by excluding Leo's and Wendt's proffered testimony. Accordingly, I would affirm the judgment of the Court of Appeals.

I. SUMMATION

The issue in this case is not whether defendants may sometimes falsely confess. Indeed, it is precisely because this possibility is so obvious that it can hardly be said to be "beyond the common knowledge of the average juror" and thus an appropriate subject of "expert" testimony under the law. Moreover, there is nothing offered in this case by the asserted "experts" on false confessions that would afford jurors any actual assistance in determining whether *defendant's* confession was, in fact, false. The police interrogation techniques Leo identified as being associated with *false confessions* were acknowledged by Leo as also being associated with *true confessions*, and the psychological traits Wendt identified as evidence of a possible *false confessor* were acknowledged by Wendt as also being traits that might be possessed by *nonfalse* confessors. Thus, neither expert's proposed testimony is relevant in any way to the jury in deciding whether *defendant* was a false confessor or a nonfalse confessor. It is hard to think of a function more central to the traditional jury role than to ascertain the credibility of ordinary witnesses and other persons. To introduce into the jury process "expert" witnesses who will testify that persons will sometimes falsely confess is to belabor the obvious and create the illusion that there is some "scientific, technical, or other specialized knowledge" that will assist the jury in carrying out its core responsibility of determining credibility. Thus, the introduction of "ex-

perts" into the realm of the mundane does not merely risk *distracting* the jury, but risks the prospect of jurors increasingly *subordinating* their own commonsense judgments—precisely the kind of judgments that form the rationale for the jury system in the first place—to the false *appearance* of expertise suggested by the presence of expert psychological testimony. The criminal trial of the near future in Michigan, one being nudged forward by today's decision, is one in which: (a) increasing numbers of criminal defendants will as a matter of routine employ "expert" witnesses to attempt to dispel the trustworthiness of their confessions, (b) increasing numbers of criminal defendants will be encouraged not to testify on their own behalf that they falsely confessed, preferring to let the jury infer this same conclusion from the testimony of "experts," (c) prosecutors will be increasingly incentivized to respond to testimony by defendants' "experts" that *false* confessions sometimes occur with testimony by their own "experts" that *truthful* confessions sometimes also occur and that, in fact, truthful confessions tend to occur more often than false confessions, with defendants' "experts" then responding that, while that may all be true, false confessions nonetheless occur more often than acknowledged by the prosecutors' "experts," (d) ordinary issues of credibility traditionally resolved by juries through the exercise of their own common sense, judgment, and experience will increasingly become the subject of battling contingents of "experts," and (e) increasingly frequent and distracting courtroom debates will take place concerning other unremarkable propositions of human behavior such as that memories fade over time, police officers sometimes testify falsely, and persons who do not look others in the eye may sometimes be testifying dishonestly. As a result, and for no good reason, the criminal trial of the near future will

be slightly more prolonged, slightly more costly for all parties, and ever slightly more open to the kind of gamesmanship that distracts the criminal trial from its principal mission, the search for the truth.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision to exclude expert testimony for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). A trial court abuses its discretion when it "chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

III. ANALYSIS

MRE 702 governs the admissibility of expert witness testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires expert testimony to be both reliable and relevant. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 597; 113 S Ct 2786; 125 L Ed 2d 469 (1993) ("[T]he Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."); *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 141; 119 S Ct 1167; 143

L Ed 2d 238 (1999) ("[S]cientific expert testimony . . . is admissible only if it is both relevant and reliable."); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004), quoting *Daubert*, 509 US at 589 (" '[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' ") (emphasis omitted).

A. TESTIMONY OF DR. LEO

I do not believe that the trial court abused its discretion by excluding Leo's testimony pursuant to MRE 702. For the reasons explained by the lead opinion, I agree that Leo's proposed testimony was not the product of reliable principles and methods and thus is inadmissible on this basis alone. However, I disagree with the lead opinion's conclusion that had Leo's testimony been the product of reliable principles and methods, it *would* have been admissible. I do not believe that the trial court abused its discretion by concluding that Leo's proposed testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." MRE 702. " 'Expert testimony is not admissible . . . when it merely deals with a proposition that is not beyond the ken of common knowledge.' " *Gilbert*, 470 Mich at 790 (citation and emphasis omitted).

Leo proposed to testify that people sometimes falsely confess. However, this is not a proposition that is outside the "common knowledge" of the average juror. Jurors, as ordinary members of the community with ordinary measures of judgment, common sense, experience, and personal insight, understand that people sometimes falsely confess, although jurors also understand that false confessions are far from the norm. Defendant argues that jurors have a tendency to believe that people will not confess to a crime that they did not

commit. Quite likely, defendant is correct. However, this asserted tendency is not inconsistent with Leo's *own* testimony at the *Daubert* hearing. Leo testified that most jurors assume that if the defendant confessed he is "probably guilty," but Leo also acknowledged that "most confessions are true" and that "false confessions are the exception." Therefore, as long as the prosecutor does not argue that people *never* falsely confess, which he has not argued here, Leo's proposed testimony that false confessions are possible offers absolutely nothing of relevance to the jury.

"[T]here is no need for expert testimony that tells the jury what it already knows." Comment, *The (in)admissibility of false confession expert testimony*, 26 Touro L R 23, 58 (2010). "As it stands, most jurors have a nuanced understanding that false confessions occur, but only rarely. An expert witness that simply repeats this fact is not 'assisting the trier of fact.' " *Id.* at 59. As one commentator explained:

> False confession theorists . . . [argue that] false confession expert testimony helps combat against . . . the myth that false confessions do not occur. However, the numbers simply do not support the notion that this myth exists. For instance, one statistic used to demonstrate this myth is that sixty eight percent of potential jurors in the District of Columbia believe that suspects falsely confess "not very often" or "almost never." Implying that these answers foreclose even the possibility of false confessions within the minds of jurors is simply wordplay: "not very often" and "almost never" do not mean "never." In fact, the data clearly corroborates most jurors' beliefs that concede the possibility of a false confession in a given case, while also noting its statistical improbability. The notion that some suspects might confess to something they did not do is within the common knowledge of jurors. [*Id.* at 56-57, citing in part Leo, *Police Interrogation and American Justice*, p 196 (2008).]

Because Leo's proposed testimony concerning the existence of false confessions is " 'not beyond the ken of common knowledge,' " *Gilbert*, 470 Mich at 790 (citation omitted), it is unlikely to "assist the trier of fact to understand the evidence or to determine a fact in issue," MRE 702, and thus is inadmissible under MRE 702.[1]

Leo also proposed to testify that certain interrogation techniques are associated with false confessions. However, given that he admitted that these *same* interrogation techniques are also associated with true confessions, I fail to see how this testimony could assist the jury.[2] Informing the jury that certain interrogation

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[1] The lead opinion contends that its conclusion that the fact that someone might falsely confess is "contrary to common sense" is supported by "[o]ur 'statement against interest' exception to the hearsay rule [which] embodies [the] presumption . . . 'that a reasonable person . . . would not have made [such a] statement unless believing it to be true.' " *Ante* at 127-128, quoting MRE 804(b)(3). However, what the lead opinion wholly fails to recognize is that Leo does not dispute that people generally do not falsely confess. Leo knows this, and jurors know this. Leo and jurors also know that there are exceptions to this general presumption and that people sometimes do falsely confess. There is absolutely nothing inconsistent between the notions that people generally do not falsely confess and that people sometimes do falsely confess and I do not believe that either of these notions lies outside the common knowledge of jurors. See *State v Free*, 351 NJ Super 203, 220; 798 A2d 83 (2002) (citation omitted) ("Although our rules of evidence recognize that people do not usually make statements against their penal interest unless they are true, it does not follow that ordinary jurors believe that all confessions made by defendants subjected to police interrogation are true."); see also Comment, 26 Touro L R at 53 ("That false confessions occur is a matter of fact; however, it is also true that false confessions are rare.").

[2] For example, Leo testified:

> [P]olice using coercive techniques sometimes results in true confessions, sometimes results in false confessions.
>
> * * *

techniques result in either true or false confessions does nothing to advance the jury's thinking. The jurors obviously know that the confession before them is either true or false, and it is their job to determine whether it is true or false. Instructing them that a confession is either true or false is only belaboring the obvious. "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert*, 509 US at 591-592. Because Leo admitted that there is no "scientific connection" between any of the interrogation techniques that he proposes to testify about and the truthfulness of a confession, his proposed testimony about these interrogation techniques does not satisfy the "helpfulness" standard of Rule 702.[3]

> The coercive, problematic techniques that might, when applied to an innocent person, lead to a false confession, but when applied to a guilty person, lead to a true or a partially true confession. You can't infer from the techniques used whether you'll get a true or false confession.
>
> * * *
>
> [T]he interrogation process . . . can lead to both true and false confessions.

[3] As the Ohio Court of Appeals explained:

> Dr. Leo . . . explained that coercive interrogation techniques do tend to be effective in producing their desired result: a confession. He conceded on cross-examination, however, that coercive techniques are also effective in inducing true confessions and he could not offer any opinion as to how many of the resulting confessions are truthful and how many are false. Thus, he could offer no expert insight into the actual likelihood that coercive interrogation tactics will lead to a false confession.
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> * * *
>
> As explained above, Dr. Leo conceded that he could not predict when a confession was false, nor could he opine that coercive interrogation tactics are more likely to yield false confessions

As the Court of Appeals explained:

> We conclude that the trial court did not abuse its discretion by excluding Dr. Leo's testimony. The trial court concluded that Dr. Leo was qualified in terms of knowledge, but it excluded Dr. Leo's testimony on several grounds including its finding that the testimony would not assist the trier of fact in understanding the evidence or in determining a fact at issue. MRE 702. This was not an abuse of discretion. Defendant essentially offered Dr. Leo's testimony to help the jury determine the reliability of defendant's confession. However, Dr. Leo's testimony would not have involved a proposition that was outside the common knowledge of a layperson. *Gilbert*, 470 Mich at 790. Dr. Leo acknowledged that the same interrogation techniques that he determined led to false confessions could also lead to true confessions. He could not identify any unique correlation between certain police interrogation tactics and false confessions. Dr. Leo explained that the reliability of a confession is determined by considering whether aspects of the confession fit with the evidence in the case. Nothing in the record here indicates that a juror cannot perform this same analysis without the assistance of expert testimony. Further, the police interrogation of defendant was recorded and the jury will be able to review the recordings at trial. Additionally, the police officers will be subject to cross-examination with respect to their specialized training in the art of interrogation and techniques they may use to pressure a defendant into confessing to a

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instead of truthful ones. Dr. Leo could not offer an opinion on which interrogation techniques lead to false confessions, he had no information about the percentage of confessions that are truthful or false, nor could he analyze a given confession and offer an opinion as to whether it was true or false.

* * *

It was not beyond the knowledge of lay jurors that coercive police interrogation tactics might be more likely to induce a confession from a criminal suspect, nor was the fact that suspects do sometimes falsely confess to a crime. [*State v Wooden*, unpublished opinion of the Ohio Court of Appeals, issued July 23, 2008 (Docket No. 23992), pp 7-9; 2008-Ohio-3629, ¶¶ 22, 26, 28.]

> crime. The jury will be able to consider the manner in which defendant's confession was elicited, and the way in which his statements progressed during the course of the interrogation, and it will be able to weigh the interrogation and confession with the remainder of the evidence introduced at trial and make a determination as to the credibility of the confession. No expert testimony is needed to assist the jury in this process. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (issues involving credibility are within the sole province of the jury). [*People v Kowalski*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2010 (Docket No. 294054), pp 3-4.]

As even the concurring/dissenting Court of Appeals judge explained, Leo's "conclusion that certain police interrogation techniques are associated with false confessions . . . is useless" because "[t]he police interrogation techniques Dr. Leo associated with false confessions are also associated with true ones and partially true ones, and there is no known difference in rates." *Id.* at 2 (DAVIS, J., concurring in part and dissenting in part). "[A]ll Dr. Leo can tell us is that police interrogation techniques are associated with *confessions*," and "[t]his association will not assist the jury[.]" *Id.* (emphasis in the original).[4]

Because Leo admitted that the same interrogation techniques that result in false confessions may also result in true confessions, his proposed testimony concerning interrogation techniques will not "assist the trier of fact to understand the evidence or to determine a fact in issue," and thus it is inadmissible under MRE 702.

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[4] Similarly, the trial court explained:

> If . . . the same techniques can lead to a true or false confession, I don't understand what relevance it would have, what relevance there would be to having Dr. Leo testify about police techniques. I don't see how he can assist the jury, how he can be helpful to the jury.

B. TESTIMONY OF DR. WENDT

Wendt proposed to testify that defendant possesses some psychological traits that can lead to false confessions. However, given that he admitted that these same psychological traits can also lead to true confessions, this testimony is equally irrelevant.[5] Informing the jury, for example, that defendant is an "anxious" person, and that anxious people sometimes falsely confess, and also sometimes truthfully confess, does little to advance the jury's thinking. The jury's responsibility is to determine whether a confession is true or false, and unless an expert has something to offer the jury in this regard that will make it more or less likely that the confession is either true or false, the expert's testimony is irrelevant. See MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

As the Court of Appeals correctly explained:

> Dr. Wendt admitted that the same personality traits that correlate with false confessions can also lead to true confessions. Dr. Wendt could not identify a specific psychological factor that distinguishes a person who makes a false confession from one who makes a true confession. Thus, his testimony would have been of no help to the jury because the jury would have still been required to weigh defendant's confession against the other evidence in the case to determine whether it was credible. [*Kowalski*, unpub op at 5.][6]

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[5] For example, when asked whether "people who have the psychological factors that you've talked about can just as equally truly confess," Wendt answered, "Correct."

[6] See also *Bixler v State*, 582 NW2d 252, 256 (Minn, 1998) ("Clearly the trial court was well within its discretion in ruling that the jury, without

C. MRE 403

Even assuming for the sake of argument that Leo's and Wendt's testimony is relevant and reliable, I believe that its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). As the United States Supreme Court has explained:

> "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." [*Daubert*, 509 US at 595, quoting Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 FRD 631, 632 (1991).]

For the reasons explained earlier, I do not believe that the testimony at issue here is even "marginally probative evidence," but even if it were, there would be a considerable risk that the jury would accord undue weight to the experts' testimony. "Since experts base

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the testimony of the psychological expert, was fully capable of observing and understanding [the defendant's] propensity to please authority figures, and taking those observations and that understanding into account in evaluating his confession."); *People v Wood*, 341 Ill App 3d 599, 608; 793 NE2d 91 (2003) ("Dr. Greenberg's testimony was properly barred" because "Dr. Greenberg's testimony that defendant was easily coerced and susceptible to intimidation is not beyond the understanding of ordinary citizens, nor is the concept difficult to understand."). Furthermore, in the instant case, Wendt's proposed testimony that defendant may have been vulnerable to interrogation techniques is particularly irrelevant in light of the interrogating officer's testimony that he was actually "try[ing] to talk [defendant] out of the confession" because defendant "had already told [the officer he] had done something and [the officer] didn't believe the details."

their testimony on science, jurors tend to find the testimony more convincing, and therefore the risk of misleading and confusing them increases." Comment, 26 Touro L R at 37. " '[Q]uestions of credibility, whether of a witness or of a confession, are for the jury,' " *Crane v Kentucky*, 476 US 683, 688; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (citation omitted), but the admission of expert testimony on the subject of false confessions, or on other subjects that are within the "common knowledge" of jurors and that pertain to credibility, have the potential to undermine the jury's role in this regard. "Indeed, as we have cautioned before, the jury in these credibility contests is looking 'to hang its hat' on the testimony of witnesses it views as impartial," *People v Peterson*, 450 Mich 349, 376; 537 NW2d 857 (1995), and it may easily come to perceive the testimony of the expert as supplying a shortcut for resolving credibility disputes between witnesses.

In the instant case, defendant will be arguing that the confession is false,[7] the prosecutor will be arguing that the confession is true, and the experts' testimony concerning false confessions, if admitted, would be viewed by the jury as testimony from people who study false confessions for a living, in support of defendant's position that the confession is false. Even though the experts will not be allowed to expressly testify that they believe that defendant falsely confessed, the jury will be led to believe that the experts know more than they are telling, because the jury will almost certainly infer that the experts must believe that defendant's confession is

[7] Defense counsel argues that if he were not allowed to present the expert witness testimony to the jury, he would be left with no response whatsoever to defendant's confession. This is simply untrue. In fact, defense counsel would be left with what is, in my opinion, the best response to the confession: defendant's own explanation regarding why he confessed.

false or else they would not be testifying on his behalf. See *Peterson*, 450 Mich at 391 (CAVANAGH, J., dissenting). The danger that the jury will be misled by the experts' testimony to believe that the interrogation techniques used by the police, in conjunction with defendant's personality traits, must have resulted in a false confession is substantial, and thus the risk that the jury's role in making credibility determinations will be undermined is also substantial.[8]

As a plurality of the United States Supreme Court explained in *United States v Scheffer*, 523 US 303, 313-314; 118 S Ct 1261; 140 L Ed 2d 413 (1998), regarding polygraph evidence:

> A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."
>
> By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. The common form of polygraph test measures a variety of physiological responses to a set of questions asked by the examiner, who then interprets these physiological correlates of anxiety and offers an opinion to the jury about whether the witness—often, as in this case, the accused—was deceptive in answering questions about the very matters at issue in the trial. Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA

[8] For a discussion of the potential of expert psychological testimony to mislead jurors, see *Clark v Arizona*, 548 US 735, 774-778; 126 S Ct 2709; 165 L Ed 2d 842 (2006) ("[T]hese empirical and conceptual problems add up to a real risk that an expert's judgment in giving . . . evidence will come with an apparent authority that psychologists and psychiatrists do not claim to have.").

> found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. [Citations omitted; emphasis in the original.]

Similarly, expert testimony concerning false confessions may diminish the jury's role in making credibility determinations. Jurors may give excessive weight to this testimony and abandon or subordinate their own primary duties to assess credibility and guilt. "[T]he testimony would . . . convert the expert witness into a human lie detector," and "[c]ourts should be as wary of admitting human lie detectors as they are of admitting the results of a polygraph test." Comment, 26 Touro L R at 57-58. "Our criminal justice system is founded on the belief that juries can understand when statements might be unreliable, and admitting expert testimony on false confessions upends this fundamental pillar." *Id.* at 74. For these reasons, I do not believe that the trial court abused its discretion by concluding that the probative value of the experts' testimony is substantially outweighed by the danger of unfair prejudice.[9]

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[9] I disagree with the lead opinion's conclusion that its "safeguards," such as the availability of a limiting instruction, "negate the danger that the expert testimony will interfere with the jury's role." *Ante* at 137 n 74. If that were the case, a limiting instruction would be able to cure all concerns relating to the probative value of evidence being "substantially outweighed by the danger of unfair prejudice," and MRE 403 would be rendered meaningless. That is, if it were sufficient to simply instruct the jury not to allow evidence's "probative value [to be] substantially

As the Court of Appeals explained:

> Although both experts testified that they would not offer opinion regarding whether defendant made a false confession, that conclusion was implicit in both of their proposed testimonies. This would interfere with the jury's role in determining the credibility and weight of the confession. Thus, there was a significant danger of unfair prejudice with respect to the proposed testimony; and, as discussed above, neither of the expert's proposed testimony had high probative value. The trial court did not abuse its discretion by concluding that MRE 403 was an additional basis on which to exclude the proffered expert testimony. [*Kowalski*, unpub op at 5.][10]

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outweighed by the danger of unfair prejudice," there would be no point in having a court rule that specifically provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. The lead opinion's other "safeguard" of not allowing the expert to expressly state that the defendant falsely confessed also does little to alleviate concerns about misleading the jury. When a jury is confronted with expert testimony that certain interrogation techniques may result in false confessions paired with testimony that the defendant himself was subject to these interrogation techniques, the invited inference will be just as misleading as expert testimony stating outright the conclusion that the defendant falsely confessed. See *Peterson*, 450 Mich at 392 (CAVANAGH, J., dissenting).

[10] Appellate courts in other jurisdictions have likewise concluded that a trial court does not abuse its discretion when it excludes expert testimony on false confessions. See, for example, *Wooden*, unpub op at 10; 2008-Ohio-3629 at ¶ 29 (holding that the trial court did not abuse its discretion by excluding Dr. Leo's testimony because it "would not offer the jurors any insight outside their own knowledge and experience"); *Vent v State*, 67 P3d 661, 669 (Alas App, 2003) (holding that the trial court did not abuse its discretion by concluding that "Dr. Leo's testimony would not appreciably aid the jury in determining whether [the defendant] made a false confession"); *State v Cobb*, 30 Kan App 2d 544, 567; 43 P3d 855 (2002) (holding that "[t]he type of testimony given by [Dr.] Leo in this case invades the province of the jury and should not be admitted"); *Free*, 351 NJ Super at 221 (holding that the trial court abused its discretion by admitting expert testimony that amounted to " 'nothing more than an assertion that false confessions do occur' " because such testimony "would be of no assistance to the jury") (citation omitted); *United States*

D. LEAD OPINION CASELAW

The lead opinion relies on *Peterson*, 450 Mich at 352-353, which held that

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

Justice CAVANAGH, joined by Justice LEVIN, dissented and explained that he would have "continue[d] to limit the use of behavioral reaction testimony to rebuttal purposes" and "preclude[d] an expert . . . from making any reference to the particular complainant or defendant" because "[t]he marginal probative value of allowing the expert to further testify with respect to the particular complainant is substantially outweighed by the danger of unfair prejudice that the jury will misuse the testimony." *Id*. at 381-382, 391.[11]

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v Adams, 271 F3d 1236, 1246 (CA 10, 2001) (holding that "[t]he judge was well within his discretion in determining that the evidence lacked relevance and would not 'assist the trier of fact as required by Rule 702' ") (citation omitted); *State v Davis*, 32 SW3d 603, 609 (Mo App, 2000) (holding that the trial court did not abuse its discretion by excluding Dr. Leo's testimony because "the jury would not be aided by Dr. Leo's testimony"); *State v Ritt*, 599 NW2d 802, 811-812 (Minn, 1999) (holding that "the trial court was within its discretion in excluding the expert testimony" because "the credibility of witnesses in criminal trials [should not] turn on the outcome of a battle among experts"); *State v Tellier*, 526 A2d 941, 943-944 (Me, 1987) (holding that the trial court did not abuse its discretion by excluding testimony "that false confessions do occur" because "its probative value was substantially outweighed by the danger of confusing the issues and of misleading the jury").

[11] The dissent further explained that such expert testimony

The lead opinion also relies on *People v Christel*, 449 Mich 578, 580, 592; 537 NW2d 194 (1995), which held that "battered woman syndrome testimony is relevant and helpful [and thus admissible] when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse" because "expert testimony is needed when a witness' actions or responses are incomprehensible to average people." Justice CAVANAGH, again joined by Justice LEVIN, concurred in part and dissented in part. He would have "limit[ed] the use of the battered woman syndrome evidence to the narrow purpose of rebutting an inference that the complainant's postincident behavior is inconsistent with that expected of rape victims" and would not have "allow[ed] an expert witness to testify with respect to the complainant's behavior in the particular case" because "the marginal probative value of allowing testimony with respect to the specific complainant's behavior is substantially outweighed by the unfairly prejudicial danger that the jury may conclude that the expert, in fact, knows that the complainant has been a battered individual." *Id*. at 601-602.

I agree with the lower courts that *Peterson* and *Christel* are fully distinguishable. First, they were decided before this Court amended MRE 702 to conform to *Daubert*, so the trial court's gatekeeper role was

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> invades the province of the jury to assess credibility. It invites the jury to give undue weight to testimony that is foundationally and fundamentally unreliable merely because it is cloaked with the expertise of an expert. It also invites the jury to believe that the expert knows more than he is telling, by letting the jurors infer that the expert, who works with sexually abused children every day, must believe this child's story or else the expert would not be testifying. [*Peterson*, 450 Mich at 391 (CAVANAGH, J., dissenting).]

different than it is now. Under the pre-*Daubert* version of MRE 702, the trial court's sole function was to determine whether the expert's testimony was "generally accepted within the scientific community." *Craig v Oakwood Hosp*, 471 Mich 67, 80; 684 NW2d 296 (2004). The trial court's gatekeeping function is much broader under the current version of MRE 702. "Rule 702 . . . assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 US at 597; see also *Kumho*, 526 US at 152 ("The objective of [*Daubert*'s gatekeeping requirement] is to ensure the reliability and relevancy of expert testimony."); *Allison v McGhan Med Corp*, 184 F3d 1300, 1310 (CA 11, 1999) ("[W]hile Rules 401 and 402 reflect the general policy of the Federal Rules for liberal admission of evidence, Rule 403, working in conjunction with Rules 702 and 703, militates against this general policy by giving courts discretion to preclude expert testimony unless it passes more stringent standards of reliability and relevance. These stricter standards are necessary because of the potential impact on the jury of expert testimony."). Furthermore, although it is common knowledge that sometimes people falsely confess, knowledge of how a sexually abused child or a battered woman may react to the abuse may not be so common. While it is one thing for this Court to hold that psychological expert testimony may be necessary in extraordinary and narrow circumstances involving a sexually abused child or a battered woman—in which it is the remarkable sense of dependency of the victims on those who have abused them that may explain their conduct—it is quite another to extend this proposition, as the lead opinion does, to commonplace circumstances in which a competent person has confessed to committing a crime. An ordinary juror may well lack the life's experience to

comprehend what is entailed in the extraordinary relationships of the sexually abused child and the battered woman, but deciding ordinary questions of witness credibility lies at the heart of the juror's responsibility.[12]

The lead opinion also relies heavily on *People v Hamilton*, 163 Mich App 661; 415 NW2d 653 (1987), which held that the trial court abused its discretion by excluding expert testimony concerning the defendant's psychological makeup because the jury should have been able to use this evidence to assess the defendant's credibility. First, this case too was decided before MRE 702 was amended to adopt *Daubert*'s standards. Second, *Hamilton* did not address at all whether the probative value of the proposed testimony was substantially outweighed by the danger of unfair prejudice under MRE 403. Furthermore, the defendant in *Hamilton* was a

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[12] The lead opinion contends that I "unreasonably assume[] that the ordinary juror has the 'life's experience to comprehend' the circumstances of police interrogation . . . and the effect of a defendant's particular psychological traits on the outcome of the interrogation." *Ante* at 127 n 48 (citation omitted). However, the lead opinion fails to explain how Leo's proposed testimony that the same police interrogation techniques that cause false confessions also cause true confessions or Wendt's proposed testimony that the same psychological traits that cause false confessions also cause true confessions will in any way help the jury decide whether the "circumstances of police interrogation" or defendant's "particular psychological traits" caused him to truthfully or falsely confess. Furthermore, as the Court of Appeals explained:

> [T]he police interrogation of defendant was recorded and the jury will be able to review the recordings at trial. Additionally, the police officers will be subject to cross-examination with respect to their specialized training in the art of interrogation and techniques they may use to pressure a defendant into confessing to a crime. The jury will be able to consider the manner in which defendant's confession was elicited, and the way in which his statements progressed during the course of the interrogation, and it will be able to weigh the interrogation and confession with the remainder of the evidence introduced at trial and make a determination as to the credibility of the confession. [*Kowalski*, unpub op at 4.]

16-year-old child when he committed the offenses and, although he was 22 years old when he confessed, he was operating psychologically at the level of a 15-year-old. *Hamilton* is distinguishable from the instant case because *Hamilton* involved a child with a disability, while the instant case involves an adult with no disability. Therefore, it is not necessary for this Court in this case to determine whether *Hamilton* was correctly decided.

E. PRINCIPAL CONCERN

My principal concern with the lead opinion pertains to its holding that expert testimony concerning false confessions, if reliable, is admissible because it is beyond the "common knowledge" of the average juror. I disagree with this assertion and am concerned that such a holding has the potential to open up the floodgates for expert testimony on a host of reasonably obvious matters of human behavior that have never been generally thought to require expert testimony. As a result, criminal trials will be increasingly converted into battles of psychological experts. See *State v Sabetta*, 680 A2d 927, 933 (RI, 1996) ("[T]o introduce the expert testimony of a psychologist concerning the unreliability of eyewitness memory . . . would effectively invade the province of the jury and . . . open a floodgate whereby experts would testify on every conceivable aspect of a witness's credibility.").

What other reasonably obvious matters of human behavior are beyond the "common knowledge" of the average juror, and may therefore necessitate expert testimony? Is it within the "common knowledge" of the juror that it is possible for a witness to inadvertently testify inaccurately or for a witness to deliberately testify falsely? Is it within the "common knowledge" of the juror that some parts of a witness's testimony may

be true, while others may be false? Is it within the "common knowledge" of the juror that eyewitness recollections may differ, although each eyewitness is testifying honestly? Is it within the "common knowledge" of the juror that sometimes police officers testify falsely and sometimes convicted felons testify truthfully? Is it within the "common knowledge" of the juror that it is possible for an eyewitness to misidentify a person? Is it within the "common knowledge" of the juror that memories fade over time? Is it within the "common knowledge" of the juror that particular forms of body language may sometimes evidence honesty or dishonesty? Should we or should we not require expert testimony regarding each of these matters? If not, why not and, if so, what exactly should be left for the jury to decide on its own?

Until today, "such normal human processes were held to be within the knowledge and experience of the jury, the triers of fact, thus requiring no expert opinion to clarify or inform their rational decision-making roles." Clifford, *Expert Testimony*, in Towl & Crighton, eds, *Forensic Psychology* (Chichester: Blackwell Publishing Ltd, 2010), ch 4, p 47. After today, however, will criminal trials increasingly become a battle of psychologists? Although a battle of psychologists may well be useful in contexts beyond the ken of the ordinary juror, it seems considerably less useful in the context of making commonsense credibility determinations—exactly the type of determinations that we have always before entrusted to the jury. See *United States v Alexander*, 816 F2d 164, 169 (CA 5, 1987) ("Requiring the admission of the expert testimony proffered . . . would have established a rule that experts testifying generally as to the value of eyewitness testimony would have to be allowed to testify in every case in which eyewitness testimony is relevant. This would constitute a gross

overburdening of the trial process by testimony about matters which juries have always been deemed competent to evaluate."). Indeed, making such commonsense credibility determinations has always been at the heart of the jury's role within our criminal justice system, and this core responsibility should not, in my judgment, be supplanted by a growing role for psychological expert testimony.[13]

IV. CONCLUSION

Because I agree with the Court of Appeals that the trial court did not abuse its discretion by excluding the expert witness testimony, I would affirm the judgment of the Court of Appeals.

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[13] The lead opinion contends that I have "exaggerated" its ramifications because its "holding is limited to the principle that a claim of a false confession is beyond the common knowledge of the ordinary person . . . ." *Ante* at 142-143. However, given its holding that "a claim of a false confession is beyond the common knowledge of the ordinary person," it is hardly "exaggerated" to question what other reasonably obvious matters of human behavior are, in the lead opinion's judgment, also "beyond the common knowledge of the ordinary person" and thus in need of expert testimony. Indeed, the lead opinion has already shown its inclination to be highly expansive regarding its "beyond the common knowledge of the ordinary person" standard by analogizing false confessions to the dependency of child sexual abuse victims and battered women on their abusers.

JOHNSON v RECCA

Docket No. 143088. Argued April 4, 2012 (Calendar No. 3). Decided July 30, 2012.

Penny Jo Johnson filed an action in the Osceola Circuit Court against John Recca, seeking third-party no-fault automobile insurance benefits, and Allstate Property and Casualty Company, seeking first-party no-fault benefits. Plaintiff claimed that she had sustained a serious impairment of a body function after being hit in an automobile-pedestrian collision involving Recca and also sought damages for replacement services, also known as ordinary and necessary services, obtained more than three years after the accident. The claims against Recca and Allstate were severed. The court granted summary disposition for Allstate, but the Court of Appeals, CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ., reversed in an unpublished opinion per curiam, issued November 9, 2010 (Docket No. 292401). In the action against him, Recca moved for summary disposition. The circuit court, Scott Hill-Kennedy, J., granted the motion, ruling that replacement services are not "allowable expenses" that a plaintiff may recover in a third-party action under MCL 500.3135(3)(c). The court also concluded that Johnson had not suffered an impairment of a body function that affected her ability to lead her normal life. Johnson appealed. The Court of Appeals, SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ., reversed and remanded for further proceedings, concluding that replacement services is a category of allowable expenses and that summary disposition was improper because there was a factual dispute concerning whether plaintiff had suffered a serious impairment of a body function. 292 Mich App 238 (2011). The Supreme Court granted Recca leave to appeal, limited to the issue whether MCL 500.3135(3)(c) includes within its scope the cost of replacement services rendered more than three years after the date of the motor vehicle accident. 490 Mich 926 (2011).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices MARY BETH KELLY and ZAHRA, the Supreme Court *held*:

Because replacement services is not among the benefit categories listed in MCL 500.3135(3)(c), damages for replacement services are not recoverable in a third-party tort action.

1. Although the no-fault automobile insurance act, MCL 500.3101 *et seq*., generally abolished tort liability arising from the ownership, maintenance, or use of an automobile, MCL 500.3135 provides several exceptions to the general rule. One exception, set forth in MCL 500.3135(3)(c), is for damages for allowable expenses, work loss, and survivor's loss as defined in MCL 500.3107 to MCL 500.3110 in excess of the daily, monthly, and three-year limitations contained in those sections. Because MCL 500.3135(3)(c) does not refer to replacement services, damages for replacement services are not recoverable under the statute.

2. Replacement services is not a category of allowable expenses. Rather, allowable expenses and replacement services are separate and distinct categories of personal protection insurance (PIP) benefits. Although replacement services was a category of work-loss benefits before 1992, each category of PIP benefits—allowable expenses, replacement services, and work loss—is currently described in a separate subdivision of MCL 500.3107(1). The separation of replacement services from work-loss benefits did not render replacement services a category of allowable expenses. Rather, the statutory organization clearly indicates that replacement services remain distinct from allowable expenses.

3. MCL 500.3107(1)(a) states that allowable expenses consist of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. In *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005), the Supreme Court stated that care may encompass expenses for products, services, and accommodations that are necessary because of the accident but may not restore a person to his or her preinjury state. However, allowable expenses do not include expenses for products or services that are required after the injury in a manner indistinguishable from those required before the injury. Services that were required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself because of the injury, are replacement services.

4. Other statutes containing general rules regarding the recovery of economic losses do not provide any basis for concluding that replacement services constitutes a category of allowable expenses. It is entirely possible that the Legislature might have intended to include or exclude replacement services from some categories of

no-fault benefits but not others depending on the scope and contours of those benefits, and the interpretation of the statute at issue is thus not absurd.

Judgment of the Court of Appeals reversed in part; circuit court's grant of summary disposition in favor of Recca on plaintiff's economic damages claim for excess replacement services expenses reinstated; leave to appeal with respect to Recca's remaining issue denied.

Justice HATHAWAY, joined by Justice MARILYN KELLY, dissenting, asserted that the Legislature intended to allow recovery of excess expenses for replacement services in third-party tort actions. Before the effective date of 1991 PA 191, expenses for replacement services were recoverable in a third-party tort action because they were a part of work-loss damages. In 1991 PA 191, the Legislature separated expenses for replacement services from work loss, but there is no indication in the statutory language or the legislative history that the Legislature intended that replacement services be treated differently before and after the amendment. Rather, the amendatory act was only intended to make changes with regard to work-loss benefits for persons over the age of 60. The majority's reading of the statutory language failed to consider all the language in MCL 500.3135(3)(c) and related statutes, producing an absurd result.

Justice CAVANAGH concurred in the result proposed by Justice HATHAWAY's dissenting opinion.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — REPLACEMENT SERVICES.

Damages for replacement services that are in excess of the daily and three-year limitations contained in MCL 500.3107(1)(c) are not recoverable in a third-party tort action brought under MCL 500.3135(3)(c).

Skupin & Lucas, P.C. (by *Joseph F. Lucas*), for plaintiff.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor*), for defendant.

Amicus Curiae:

Willingham & Coté, P.C. (by *Kimberlee A. Hillock* and *John A. Yeager*), for the Insurance Institute of Michigan.

MARKMAN, J. We granted leave to appeal to consider whether, in a third-party tort action, damages for replacement services are recoverable pursuant to MCL 500.3135(3)(c).[1] Because "replacement services" is not among the categories listed in MCL 500.3135(3)(c), damages for replacement services are not recoverable in such an action. Accordingly, we reverse the Court of Appeals' judgment in part and reinstate the trial court's grant of summary disposition in defendant's favor on plaintiff's economic damages claim for replacement services expenses.

I. FACTS AND HISTORY

In July 2004, while walking through a gas station parking lot, plaintiff was struck by a motor vehicle driven by defendant, who was insured by Allstate Property and Casualty Insurance Company. At the time, plaintiff lived with Harrietta Johnson, her ex-mother-in-law. Neither woman owned a vehicle, and neither was insured. Plaintiff filed a third-party tort claim against defendant, seeking damages for replacement services pursuant to MCL 500.3135(3)(c). The trial court granted summary disposition in defendant's favor, concluding that plaintiff could not recover damages for replacement services pursuant to MCL 500.3135(3)(c). The Court of Appeals reversed, concluding that plaintiff could recover damages for replacement services under MCL 500.3135(3)(c). *Johnson v Recca*, 292 Mich App 238, 249; 807 NW2d 363 (2011). Defendant appealed, and we granted leave, limited to

[1] We note that on June 7, 2012, the Governor signed 2012 PA 158, which, effective October 1, 2012, amends MCL 500.3135 to increase the amount of motor vehicle damage not covered by insurance for which a person may sue the responsible party. The amendatory act does not affect our analysis here.

the issue whether MCL 500.3135(3)(c) includes within its scope the cost of replacement services rendered more than three years after the date of the motor vehicle accident. *Johnson v Recca*, 490 Mich 926 (2011).[2]

II. STANDARD OF REVIEW

We review de novo motions for summary disposition brought under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). We also review de novo issues of statutory interpretation. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. ANALYSIS

At issue is whether, in a third-party tort action, damages for replacement services are recoverable pursuant to MCL 500.3135(3)(c). Under the no-fault automobile insurance act, MCL 500.3101 *et seq*., insurance companies are required to provide first-party insurance benefits, referred to as personal protection insurance (PIP) benefits, for certain expenses and losses. MCL 500.3107; MCL 500.3108. PIP benefits are payable for four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services. "Survivor's loss" is defined in MCL 500.3108(1), and "allowable expenses," "work loss," and replacement services are defined as follows in MCL 500.3107(1):[3]

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[2] With respect to defendant's remaining issue, leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court.

[3] The term "replacement services" originates from the Uniform Motor Vehicle Accident Reparations Act (UMVARA), which provides:

> "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for

(a) *Allowable expenses* consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.

(b) *Work loss* consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner [of the Office of Financial and Insurance Regulation] but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

(c) [*Replacement services*] Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had

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the benefit of himself or his family, if he had not been injured. [UMVARA, § 1(a)(5)(iii); 14 ULA 44.]

> not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [Emphasis added.]

Although the no-fault act generally abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle, MCL 500.3135 provides several exceptions to the general rule. One such exception is set forth in MCL 500.3135(3), which provides in relevant part:

> Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished except as to:
>
> * * *
>
> (c) Damages for *allowable expenses, work loss, and survivor's loss* as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured. [Emphasis added.]

"An overarching rule of statutory construction is that this Court must enforce clear and unambiguous statutory provisions as written." *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12; 795 NW2d 101 (2009) (*USF&G*) (quotation marks and citation omitted). MCL 500.3135(3)(c) is a clear and unambiguous provision, providing that "[d]amages for allowable expenses, work loss, and survivor's loss" are recoverable in a third-party tort action. MCL 500.3135(3)(c) does not mention

damages for replacement services. Therefore, in a third-party tort action, damages for replacement services are not recoverable pursuant to MCL 500.3135(3)(c),[4] and the Court of Appeals erred by holding otherwise.

IV. THE COURT OF APPEALS ERRED

Contrary to our present holding, the Court of Appeals held that damages for replacement services are recoverable in a third-party tort action. *Johnson*, 292 Mich App at 249. Apparently in agreement with our conclusion that only damages for those categories of PIP benefits actually mentioned in MCL 500.3135(3)(c) are recoverable, it grounded its holding in the observation that "replacement services" constitutes "merely one category of allowable expenses." *Id.* at 247. For the reasons explained in this opinion, we disagree. Instead, we believe that "replacement services" and "allowable expenses" constitute separate and distinct categories of PIP benefits under the statute.

A. STATUTORY ORGANIZATION

The first and most obvious criticism of the Court of Appeals' conclusion that replacement services constitutes a subcategory of allowable expenses is that this simply overlooks the Legislature's own statutory organization, which makes clear that allowable expenses and replacement services constitute separate and distinct categories of PIP benefits. "Allowable expenses"

[4] This conclusion is supported by the traditional legal maxim *expressio unius est exclusio alterius*, "the expression of one thing suggests the exclusion of all others," *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003), which is reinforced here because MCL 500.3135(3) provides that tort liability is abolished "except" with regard to those damages listed in MCL 500.3135(3).

are described in MCL 500.3107(1)(a), "replacement services" are described in MCL 500.3107(1)(c), and "work loss" expenses are described in-between in MCL 500.3107(1)(b). "Replacement services" are not described or referred to in the same subdivision as "allowable expenses," nor are "replacement services" described in any subpart of "allowable expenses." This organization of MCL 500.3107 clearly indicates that "replacement services" constitutes a category of PIP benefits that is separate and distinct from "allowable expenses."

"We interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). Statutory interpretation requires courts to consider the *placement* of the critical language in the statutory scheme. *USF&G*, 484 Mich at 13. In doing so, courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). The Court of Appeals' interpretation improperly rendered the Legislature's organization nugatory by giving no effective meaning to the Legislature's compartmentalization of "allowable expenses" and "replacement services."[5]

[5] The Court of Appeals attempted to explain why the Legislature separately addressed "allowable expenses" and "replacement services" by asserting that the statutory separation of these categories of expenses enabled the Legislature to place limits on the amount of replacement services that must be paid by a no-fault insurer. *Johnson*, 292 Mich App at 247. However, nothing would have prevented the Legislature from establishing those limits even if replacement services had been included in the same subdivision as allowable expenses. Indeed, the Legislature

B. *GRIFFITH v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY*

The Court of Appeals also misread our decision in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005). In *Griffith*, the plaintiff was severely injured in a motor vehicle accident. After the plaintiff returned home from a nursing facility, the defendant insurance company denied the plaintiff's claim for food costs,[6] and the plaintiff brought suit, alleging that food costs constituted allowable expenses. This Court rejected that argument, explaining that in MCL 500.3107(1)(a), "recovery" and "rehabilitation" refer to restoring an injured person back to the condition he or she was in before sustaining the injuries, while the term "care" has a broader and more encompassing meaning. *Id.* at 534-535. That is, "care" "may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state." *Id.* at 535. However, we clarified that

> the statute does not require compensation for any item that is reasonably necessary to a person's care in general. Instead, the statute specifically limits compensation to charges for products or services that are reasonably necessary "for an *injured person's* care, recovery, or rehabilitation." (Emphasis added.) This context suggests that "care" must be related to the insured's injuries. [*Id.* at 534.]

We further clarified:

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was able to accomplish that result where replacement services were formerly placed in the same subdivision as work loss. See part IV(C) of this opinion.

[6] Relevant to both *Griffith* and this case, the food costs at issue in *Griffith* were for "ordinary, everyday food expenses" and not for special dietary or nutritional expenses that were necessitated by the injury. *Griffith*, 472 Mich at 531-532.

> [I]f Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a). [*Id*. at 536.]

Citing *Griffith*, the Court of Appeals reasoned:

> Considered within the definition of "care" in § 3107(1)(a) provided by the Supreme Court in *Griffith*, replacement services are services for the "care" of an injured person. Replacement services are those services performed by another that the injured person would have performed for his or her benefit or the benefit of dependents had the person not been injured. MCL 500.3107(1)(c). Consequently, replacement services are services that are needed as the result of an injury sustained in the motor vehicle accident. See *Griffith*, 472 Mich at 535. . . . Because replacement services are services for the "care" of an injured person, we conclude that replacement-services expenses are not separate and distinct from allowable expenses; rather, they are merely one category of allowable expenses. [*Johnson*, 292 Mich App at 246-247.]

The Court of Appeals' wholesale inclusion of "replacement services" as a subcategory of "allowable expenses" rests on its overly expansive reading of *Griffith*. Although it can be fairly said that "replacement services are services that are needed as the result of an injury," *id*., at 246, it does not follow that they fall within the definition of "care" set forth in *Griffith*. Accordingly, it does not follow that replacement services constitutes merely a subcategory of allowable expenses.

As we noted in *Griffith*, "the statute does not require compensation for any item that is reasonably necessary to a person's care *in general*." *Griffith*, 472 Mich at 534 (emphasis added). Rather, such care "must be related to the insured's injuries." *Id.* In *Griffith*, the plaintiff's

food costs were not allowable expenses because "if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now." *Id.* at 536. Accordingly, allowable expenses do not include expenses for products or services that are required after the injury in a manner indistinguishable from those required before the injury. Those services are not properly characterized as "related to the insured's injuries."

Services that were required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself *because* of the injury, are "replacement services," not "allowable expenses." They are services "in lieu of those that, if he or she had not been injured, an injured person would have performed . . . for the benefit of himself or herself . . . ." MCL 500.3107(1)(c). Thus, contrary to the Court of Appeals' interpretation of *Griffith*'s definition of "care," replacement services is not "merely one category of allowable expenses"; rather, allowable expenses and replacement services are separate and distinct categories of PIP benefits.

In support of its interpretation, the Court of Appeals provided the following example:

> [P]laintiff claims that before the accident she prepared her own meals, but since the accident and because of the back injury she sustained in the accident, she is no longer able to cook and [her ex-mother-in-law] does so for her. If a person injured in a motor vehicle accident cooked his or her food before being injured, but because of the injury sustained is no longer able to cook, any expense incurred in paying someone to cook for him or her is a replacement-service expense. But the expense is *also* conceptually an "allowable expense" because the cooking service is "care"

> as defined in *Griffith*; it was necessitated by the injury sustained in the accident. [*Johnson*, 292 Mich App at 246-247 (emphasis added).]

The Court of Appeals was correct that because someone else must now, because of the injury, cook plaintiff's meals, cooking constitutes a replacement service. That is, it is an "ordinary and necessary service[] in lieu of [one] that, if he or she had not been injured, [plaintiff] would have performed" for her own benefit. MCL 500.3107(1)(c). However, the Court of Appeals was incorrect that "the expense is *also* . . . an 'allowable expense' because the cooking service is 'care' as defined in *Griffith*[.]" *Johnson*, 292 Mich App at 247. The cooking service is not "care" as defined in *Griffith*.

As with the food in *Griffith*, there is no doubt that cooking is necessary for plaintiff's survival. However, cooking is not "care" pursuant to MCL 500.3107(1)(a) because if plaintiff "had never sustained, or were to fully recover from, [her] injuries," her need to have food cooked "would be no different" than it is now. *Griffith*, 472 Mich at 536. Cooking was required both before and after plaintiff's injury. Thus, cooking is necessary to plaintiff's care *in general*, but is not *specifically* "related to the insured's injuries," which places it outside the scope of "allowable expenses." *Id.* at 534. Rather, cooking in this instance is solely a "replacement service," something that must now be done on *behalf* of an injured person.[7]

For these reasons, our definition of "care" in *Griffith* does not support, but refutes, the Court of Appeals'

[7] On the other hand, if a person sustains injuries that necessitate that someone actually feed the person, this service would constitute "care" pursuant to MCL 500.3107(1)(a). The need to have someone feed the injured person would not have existed absent the injuries, and this service would then be specifically related to the person's injuries.

conclusion that "replacement services" constitutes a subcategory of "allowable expenses."

C. OTHER NO-FAULT PROVISIONS

The other provisions of the no-fault act cited by the Court of Appeals in support of its interpretation of MCL 500.3107(1) do not provide any basis, in our judgment, for concluding that replacement services constitutes a subcategory of allowable expenses. These statutes, MCL 500.3110(4),[8] MCL 500.3116(4),[9] MCL 500.3135(3)(c), and MCL 500.3145(1),[10] contain general

[8] MCL 500.3110(4) provides:

> Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the *allowable expense, work loss or survivors' loss* is incurred. [Emphasis added.]

[9] MCL 500.3116(4) provides:

> A subtraction or reimbursement shall not be due the claimant's insurer from that portion of any recovery to the extent that recovery is realized for noneconomic loss as provided in [MCL 500.3135(1)] and (2)(b) or for *allowable expenses, work loss, and survivor's loss* as defined in [MCL 500.3107 to MCL 500.3110] in excess of the amount recovered by the claimant from his or her insurer. [Emphasis added.]

[10] MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent *allowable expense, work loss or survivor's loss* has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized

rules regarding the recovery of economic losses. Thus, argued the Court of Appeals, replacement services, as economic losses, should be included whenever the phrase "allowable expenses, work loss, and/or survivor's loss" is used in the no-fault act.[11] If replacement services are included among "allowable expenses, work loss, and survivor's loss," *all* economic losses are covered by the foregoing provisions. If not, replacement services would be the only economic losses excluded. That is, replacement services, and only replacement services, would be excluded from the accrual provision, MCL 500.3110(4); the subtraction-or-reimbursement provision, MCL 500.3116(4); the residual-tort-liability provision, MCL 500.3135(3)(c); and the exception to the one-year period of limitations in MCL 500.3145(1). This, the Court of Appeals argued, supports the conclusion that replacement services constitutes a category of allowable expenses. *Johnson*, 292 Mich App at 248. Although this argument has superficial appeal, it suffers from two flaws.

First, even if it is true that the foregoing provisions imply that replacement services should be included among the listed economic losses, nothing in them

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agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

[11] The Court of Appeals frames this determination in the negative, explaining: "We find nothing in the language of the no-fault act to suggest an intent by the Legislature to exclude replacement services expenses from general rules applying to the recovery of economic losses." *Johnson*, 292 Mich App at 248. Yet, as defendant submits, the more pertinent question is whether the no-fault act *includes* replacement services within MCL 500.3135(3)(c) as damages spared from the general abolition of tort liability, not whether there is any reason to exclude them. MCL 500.3135(3)(c) is explicitly *exclusive*; unless there is a reason to *include* replacement services, they must be excluded.

suggests that replacement services is a subcategory of *allowable expenses*, as opposed to work loss or survivor's loss. Before 1992, MCL 500.3107 referred to only two types of benefits—"allowable expenses" and "work loss." MCL 500.3107, as amended by 1988 PA 312, provided:

> Personal protection insurance benefits are payable for the following:
>
> (a) *Allowable expenses* consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except when the injured person requires special or intensive care, or before October 1, 1988 charges for funeral and burial expenses in excess of $1,000.00. Beginning October 1, 1988, benefits for funeral and burial expenses shall be payable in the amount set forth in the policy but shall not be less than $1,750.00 nor more than $5,000.
>
> (b) *Work loss* consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured and [*replacement services*] *expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent*. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable

> for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner [of insurance] but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of the change in the maximum. [Emphasis added.][12]

The provision governing allowable expenses under the 1988 version of MCL 500.3107 was, for the instant purposes, identical to the corresponding provision in the current version of MCL 500.3107.[13] This, however, is not the case for the provision governing work loss. Before 1992, work loss benefits included, in addition to loss of income from work, replacement services, i.e.,

> expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(b), as amended by 1988 PA 312.]

Effective in 1992, the Legislature moved that portion of the work loss provision describing replacement services into its own subdivision, MCL 500.3107(1)(c), and

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[12] MCL 500.3107 was first enacted in 1972 and became effective on March 30, 1973. 1972 PA 294. 1988 PA 312 made only minor changes to the statute, including the funeral and burial expense-limit adjustment set forth at the end of MCL 500.3107(a) and the addition of a serial comma to the phrase "care, recovery, or rehabilitation."

[13] The current version of the statute was enacted by 1991 PA 191, effective January 1, 1992. The 1991 amendment did not substantively alter the allowable expenses provision but merely revised the language concerning funeral and burial expenses.

otherwise left the remainder of the work loss provision, now MCL 500.3107(1)(b), unchanged. MCL 500.3107, as amended by 1991 PA 191, effective January 1, 1992. This suggests that the Legislature *never* considered replacement services to constitute a subcategory of allowable expenses. Rather, when replacement services were formerly included within another category of benefits, those benefits were work loss benefits, not allowable expenses benefits.[14] Given that replacement services was a category of work loss benefits before 1992, and, thus, clearly not a category of allowable expenses benefits, the fact that "allowable expenses" is defined in the same way that it was in 1972 and 1988 belies the conclusion that replacement services somehow became a category of allowable expenses in 1992. In sum, just as the use of the term "allowable expenses" did not import replacement services into MCL 500.3110(4), MCL 500.3116(4), 500.3135(3)(c), and MCL 500.3145(1) before the effective date of 1991 PA 191, it does not import them now.

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[14] The Court of Appeals asserted that because the "expenses" in MCL 500.3107(1)(c) are not labeled "replacement services expenses," "it is reasonable to conclude that the expenses are simply one category of allowable expenses . . . ." *Johnson*, 292 Mich App at 247-248. This assertion is unavailing for several reasons. First, "allowable expenses" is a concept that is specifically defined in MCL 500.3107(1)(a). It simply will not do to say that because MCL 500.3107(1)(c) refers to "expenses" that are *allowable* under that subsection, that such expenses can then be considered "allowable expenses" despite the specific definition of "allowable expenses" in a separate subdivision. Second, as the foregoing analysis makes clear, replacement services benefits constituted a subcategory of work loss benefits before 1992, and the same argument—that because the description of allowable expenses for replacement services used the term "expenses," expenses for replacement services must be "allowable expenses"—would have applied then. Thus, if the term "expenses" in the description of replacement services did not render them "allowable expenses" before 1992, nothing suggests it should do so now.

Second, this argument is directed at the wrong branch of government. This Court only has the constitutional authority to exercise the "judicial power." Const 1963, art 6, § 1. "[O]ur judicial role 'precludes imposing different policy choices than those selected by the Legislature . . . .' " *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002), quoting *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). "Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts . . . have no concern." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157; 189 NW 1006 (1922) (quotation marks and citation omitted). "It is to be assumed that the legislature . . . had full knowledge of the provisions . . . and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what we may think might well have been incorporated." *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934). Thus, despite the acknowledged possibility that the Legislature's failure to amend MCL 500.3135(3)(c) and the other provisions that employ the phrase "allowable expenses, work loss, and/or survivor's loss" to include replacement services may have been the result of an oversight, that is not self-evident to us, and the judiciary is powerless to address the problem. Simply stated, the judicial branch cannot amend the no-fault act to make it "better." That is an authority reserved solely to the Legislature.

V. RESPONSE TO THE DISSENT

This case is focused on a tension that exists within the no-fault act. On one side, the language of MCL 500.3135(3)(c) and the organization of MCL 500.3107 indicate that replacement services are not recoverable

in a third-party tort action. See parts III and IV(A) of this opinion. On the other side, it is not easy to comprehend why the Legislature would elect to exclude only replacement services from the no-fault provisions that provide the general rules regarding the recovery of economic losses. See part IV(C) of this opinion. Thus, in arriving at a decision, this Court is confronted with the task of resolving this tension, and the majority attempts to do so through the analysis previously set forth.

The dissent, however, elects to ignore this tension and therefore concludes that this is a simple case. It finds little need to engage in statutory analysis, or to assess the implications of the statute's organization, but focuses on the exclusion of replacement services from the other no-fault provisions concerning economic losses. Thus, it has minimized exactly those aspects of this case that make it so difficult. By minimizing the obvious tension that defines the relevant provisions of the no-fault act, the dissent transforms a difficult interpretive task into an easy one.

To the extent that the dissent can be said to have actually considered the language and organization of the statute, it does so in the most cursory fashion, largely relying on a house legislative analysis, a staff-prepared summary of the law that this Court has previously described as "entitled to little judicial consideration" in the construction of statutes. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597, 600 (2003). Further, even if in this instance the house legislative analysis did constitute a reliable indicator of the Legislature's intent, the specific analysis invoked by the dissent nonetheless fails to support its conclusion that replacement services are recoverable in a third-party tort action. Rather, the dissent strains to

make its point from this analysis by relying solely on its silence regarding other intended changes. See *post* at 201.

Where the dissent actually engages with the statutory language itself is almost exclusively in its assertion that the majority's interpretation renders "allowable expenses" nugatory in MCL 500.3135(3)(c). The dissent argues that since there are no "daily, monthly or 3-year limitations" on allowable expenses pursuant to MCL 500.3107(1)(a), the reference in MCL 500.3135(3)(c) to "allowable expenses" is nugatory unless "allowable expenses" includes replacement services. Although we recognize that the dissent is correct that there are no limitations on allowable expenses, the dissent's argument is unpersuasive. The acknowledgedly nugatory reference to "allowable expenses" in MCL 500.3135(3)(c) existed before MCL 500.3107 was amended by 1991 PA 191. Because replacement services were included in *work loss benefits* before the amendatory act was adopted, the reference to *allowable expenses* was clearly nugatory at that time, and there is no indication that the Legislature intended to rectify this problem when it amended MCL 500.3107 in 1991. See part IV(C) of this opinion. In short, just as the reference to "allowable expenses" in MCL 500.3135 was essentially an empty vessel before the 1991 amendment, it remained an empty vessel after the amendment. That is, the majority's interpretation *here* is not what renders the reference to "allowable expenses" in MCL 500.3135(3)(c) nugatory.[15] Even more pertinently, how-

[15] The dissent contends that the reference to "allowable expenses" was not nugatory before the 1991 amendment. See *post* at 204. However, it fails to explain how that could have been the case given that, as previously explained, replacement services were included in work loss benefits at that time. What else apart from "replacement services" could possibly have been included in "allowable expenses" at the time?

ever, the dissent's proposal to remedy this admittedly nugatory reference would render nugatory the overall organization of MCL 500.3107(1), a problematic result that does not seem to concern the dissent. Thus, there are alternative understandings of this highly imperfect statute that render nugatory either the reference to "allowable expenses" in MCL 500.3135(3)(c) or the overall organization of the statute. The majority seeks to address and resolve this tension, while the dissent avoids it. Accordingly, although our interpretation maintains the nugatory reference to "allowable expenses," a reference that has been in place since before the 1991 amendment of MCL 500.3107, the dissent's proposed interpretation renders the Legislature's larger structure nugatory.

Moreover, the dissent is internally inconsistent in this regard. On one hand, the dissent asserts that the reference to "allowable expenses" in MCL 500.3135(3)(c) is rendered nugatory unless that reference includes replacement services. Thus, it concludes that "allowable expenses" must include replacement services. On the other hand, the dissent asserts that the 1991 amendment did not affect the categorization of PIP benefits in MCL 500.3107(1). Thus, it concludes that "work loss" must include replacement services. However, replacement services cannot be included in MCL 500.3135(3)(c) simultaneously as both allowable expenses *and* work loss benefits. The dissent cannot have it both ways; the 1991 amendment either changed the PIP categories or it did not.

Perhaps, or perhaps not, recognizing this inconsistency, the dissent then proceeds to argue that "the more logical interpretation of [MCL 500.3135(3)(c)] is that" "allowable" modifies "expenses," "work loss," and "survivor's loss." *Post* at 204. That is, the "allowable ex-

penses" defined in MCL 500.3107(1)(a) are different from the "allowable expenses" referred to in MCL 500.3135(3)(c). Never mind that it would be entirely superfluous for MCL 500.3135(3)(c) to refer to "allowable work loss" or "allowable survivor's loss" "as defined in [MCL 500.3107 to 500.3110]" unless those sections somehow provided for the recovery of *nonallowable* benefits, which they certainly do not. As we explained in response to the Court of Appeals' similar argument, see note 14 of this opinion, it is simply unreasonable to believe that although the no-fault act clearly defines the term "allowable expenses" in MCL 500.3107(1)(a), "allowable expenses" should be given a *different* definition in other provisions of the same act. Additionally, replacement services were included in work loss benefits before 1992, and this same argument would have applied then. Yet replacement services clearly fell within MCL 500.3135(3)(c)'s reference to "work loss" at that time. Thus, if the term "expenses" in the description of replacement services did not render replacement services "allowable expenses" pursuant to MCL 500.3135(3)(c) before 1992, it should not do so now.

None of these difficulties in giving reasonable and coherent meaning to MCL 500.3135(3)(c) is acknowledged or addressed by the dissent, or causes it to demonstrate insight into either the imperfections of the statute or its own construction of that statute. Instead, it is much easier to isolate only those parts of the statute that lend support for the results the dissent evidently prefers and to characterize as "absurd" any other result. But although the dissent is selective in the parts of the statute to which it gives attention, avoiding language that is most troublesome from its perspective, the dissent nonetheless reveals much by its invocation of the 'absurd results' doctrine. One can be quite sure

that the dissent would have felt no need to invoke such an extraordinary doctrine in reaching its conclusions had the actual language of the statute been in any way sufficient to reach the same conclusion.

Nevertheless, the dissent concludes that our interpretation is "not consistent with the legislative intent," *post* at 199, but, rather, constitutes "a systematic dismantling of significant sections of the no-fault act [that] produces absurd results," *post* at 200. The dissent premises its conclusions on its idiosyncratic formulation of an "absurd results" doctrine.[16] The rationale for the dissent's assertion that our analysis produces "absurd results" is entirely grounded in the fact that our interpretation excludes replacement services from not only the residual-tort-liability provision, MCL 500.3135(3)(c), which is at issue in this case, but also the accrual provision, MCL 500.3110(4); the subtraction-or-reimbursement provision, MCL 500.3116(4); and the exception to the one-year period of limitations in MCL 500.3145(1).

The justices in the majority have differences concerning whether the "absurd results" doctrine exists in Michigan.[17] See *Univ of Mich Regents v Titan Ins Co*,

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[16] Although the dissent never actually articulates the standard by which it deems a result to be "absurd," it cites Justice MARILYN KELLY's dissent in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), for the general proposition that "statutes should be construed to avoid absurd results . . . ." *Post* at 200 n 6 (citation and quotation marks omitted). In *Cameron*, Justice KELLY argued that "a result is absurd where it is clearly inconsistent with the purposes and policies of the act in question." *Cameron*, 476 Mich at 128-129 (KELLY, J., dissenting). Still, to the extent that the dissent's standard can be determined at all, that standard seems to fall well short of even Justice KELLY's standard in *Cameron*, rejecting as "absurd" any results the dissent finds "illogical." See *post* at 198, 204, and 206.

[17] Although the dissent claims that it is "ironic" that we are so critical of its use of the "absurd-results" doctrine given that "members of the

487 Mich 289, 346 n 16; 791 NW2d 897 (2010) (MARKMAN, J., dissenting), overruled by *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; 815 NW2d 412 (2012). For those justices who do not believe the doctrine has a place in our jurisprudence, see *People v McIntire*, 461 Mich 147, 152-160; 599 NW2d 102 (1999), whether the dissent is correct or not that the results here can be characterized as "absurd" is inapposite: the words mean what they say, replacement services are not listed in MCL 500.3135(3)(c) and, therefore, replacement services are not recoverable under that provision. For those who do adhere to the "absurd results" doctrine, the results here are simply not "absurd." "[A] result is only absurd if it is quite impossible that [the Legislature] could have intended the result . . . ." *Titan*, 487 Mich at 346 (MARKMAN, J., dissenting) (citation and quotation marks omitted), quoting *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 85 n 9; 718 NW2d 784 (2006) (MARKMAN, J., concurring). It is not "quite impossible" that the Legislature could have intended the result here.

To properly invoke the "absurd results" doctrine, the burden rests on the *dissent* to show that it is quite impossible that the Legislature could have intended to

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majority are in complete disagreement among themselves regarding the proper use or existence of the absurd-results doctrine," *post* at 204 n 13, there is not the least such "irony." First, the dissent invokes a doctrine that it altogether fails to define and indeed flies in the face of contrary definitions by individual dissenting justices. See note 16 of this opinion. Thus, whether the dissenting justices are in their own "complete disagreement among themselves" regarding the doctrine cannot be answered simply because it is impossible to discern what any one of them believes is required by the doctrine. Second, the majority squarely acknowledges that there are differences among us regarding the "absurd results" doctrine. However, regardless of its vitality, the doctrine has no relevance in the instant case. The dissent thus not only avoids any genuine scrutiny of the unmistakable tensions within the statute, but it leaves the bench and bar in the dark concerning the principles by which the dissent proposes to avoid this tension.

exclude replacement services from MCL 500.3110(4), MCL 500.3116(4), MCL 500.3135(3)(c), and MCL 500.3145(1). Rather than shoulder this burden—which might require a serious-minded analysis of the Legislature's policy objectives in enacting the statutes, the political realities and disagreements within the Legislature that adopted the statutes, the necessity for compromise and negotiation leading to enactment of the statutes, and the public impetus behind the statutes—the dissent characterizes our interpretation as "absurd" because the dissent

> can see no logical basis to conclude that the Legislature intended this chaotic and arbitrary approach to the collection of no-fault benefits. . . . The far more reasonable interpretation recognizes that the Legislature intended MCL 500.3135(3)(c) to allow excess expenses for ordinary and necessary services to be recovered in a third-party tort action. [*Post* at 206.]

However, the "absurd results" doctrine "must not be invoked whenever a court is merely in disagreement, however strongly felt, with the policy judgments of the Legislature." *Cameron*, 476 Mich at 80 (MARKMAN, J., concurring). Still, the dissent fails to grapple with its obligations under the "absurd results" doctrine, preferring instead to summarily impose on the law its own characterization of the statute's unstated yet supposedly "obvious intent," *post* at 198, which "obvious intent" should be allowed to trump the actual words and statutory organization enacted by the Legislature. As in *Cameron*, although perhaps the law in question here could have been made more consistent or more complete in some ways, we cannot conclude that it is "quite impossible" that the Legislature could have intended its results. At the very least, it is the burden of plaintiffs, not this Court, to explain why the results reached in this case are "quite impossible." In the

absence of this burden's being satisfied, those in the majority who subscribe to an "absurd results" rule prefer to err on the side of the language and organization of the statute rather than on the side of a supposedly "obvious intent" that is nowhere communicated within the vehicle within which "obvious intents" are usually communicated: the statute itself.

Although it is not our burden to suggest conceivable explanations that would render the instant statute "not absurd," one *possible* explanation for the exclusion of replacement services from MCL 500.3135(3)(c) and other provisions of the no-fault act concerning economic losses lies in the obvious fact that the four types of benefits identified in MCL 500.3107 and MCL 500.3108 are defined, operate, and apply differently. For example, work loss benefits are limited to the first three years after the date of an accident, MCL 500.3107(1)(b), while allowable expenses are not, MCL 500.3107(1)(a). Survivor's loss benefits have a ceiling for each 30-day period, MCL 500.3108(1), while replacement services do not, MCL 500.3107(1)(c). Put simply, these benefits are not fungible or indistinguishable in every particular *except* for the treatment of replacement services. Rather, it is entirely possible that the Legislature might have chosen to include or exclude replacement services from some categories of no-fault benefits, but not from others, depending on the scope and contours of each of those benefits. Moreover, although the dissent cites "the chaotic consequences that will result from" our interpretation as the basis for its "absurd results" conclusion,[18] *post* at 204, the only *actual* absurdity it

[18] The dissent characterizes our interpretation as a "sudden departure from the historical rule." *Post* at 204. The rule to which the dissent refers is the Court of Appeals' conclusion in *Swantek v Auto Club of Mich Ins Group*, 118 Mich App 807, 809; 325 NW2d 588 (1982), that the "right of action against the tortfeasor for excess economic loss exists in . . .

contends will arise is that replacement services will be treated differently than all other no-fault benefits, see *post* at 204-206. That is true. Yet "treating things differently" or "treating things alike," as the case may be, of course, lies at the core of legislative decision-making and, absent legislative categorizations that implicate the Constitution, such categorizations are generally no business of this Court, even if some of its justices may believe that more "reasonable" categories could have been chosen.

Although it may be that the "better" public policy would be to include replacement services in these other provisions of the no-fault act, this Court is not empowered to act as the people's lawmaker-in-chief. Rather, it must be assumed that the language and organization of

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replacement services." Even if we set aside the facts that this Court is not bound by decisions of the Court of Appeals and that the statement constitutes dictum from a case considering whether travel expenses to obtain medical treatment were recoverable as PIP benefits, *Swantek* was decided a decade before MCL 500.3107 was materially amended, at which time replacement services were removed from the work loss provision. Thus, at the time *Swantek* was decided, replacement services may have been recoverable under MCL 500.3135 *as work loss*.

The dissent also cites *Kreiner v Fischer*, 471 Mich 109, 114 n 2; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180 (2010), and the model civil jury instruction on economic and noneconomic losses in an action for third-party benefits involving comparative negligence, M Civ JI 36.15, in support of its analysis. While *Kreiner* did mention that damages for replacement services are recoverable in tort, the issue in *Kreiner* was whether the plaintiffs had satisfied the "serious impairment of body function" threshold set forth in MCL 500.3135(1), not whether damages for replacement services were recoverable in tort under MCL 500.3135(3)(c). Therefore, that statement was dictum. As for the model civil jury instruction, it is axiomatic that those instructions are not binding law. They are offered merely to assist trial courts. See *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). The dissent is incorrect that by today's decision we depart from some "historical rule," *post* at 204, or cast aside a "well-established interpretation of MCL 500.3135(3)(c)," *post* at 198.

the statute better embody the "obvious intent" of the Legislature than does some broad characterization surmised or divined by judges. As previously explained, there are a number of reasons why the Legislature might conceivably have intended to exclude replacement services from MCL 500.3135(3)(c). It is not for this Court to "enhance" or to "improve upon" the work of lawmakers where we believe this can be done, for it will always be easier for 7 judges on this Court to reach agreement on the merits of a law than 110 state representatives and 38 state senators representing highly diverse and disparate constituencies. Therefore, this Court must, as our interpretation does, rest its analysis on the language and organization of the statute.

VI. CONCLUSION

In a third-party tort action, damages for excess allowable expenses, work loss, and survivor's loss are recoverable pursuant to MCL 500.3135(3)(c). Because replacement services are not among the categories listed in MCL 500.3135(3)(c), damages for replacement services are not recoverable in such an action. Accordingly, we reverse the Court of Appeals' judgment in part, reinstate the trial court's grant of summary disposition in defendant's favor on plaintiff's economic damages claim for replacement services expenses, and remand the case to the trial court for further proceedings not inconsistent with this opinion.

YOUNG, C.J., and MARY BETH KELLY and ZAHRA, JJ., concurred with MARKMAN, J.

HATHAWAY, J. (*dissenting*). This Court granted leave to examine whether MCL 500.3135(3)(c) permits recov-

ery of expenses in excess of the limitations contained in MCL 500.3107 to MCL 500.3110 for "ordinary and necessary services"[1] under the no-fault act in a third-party tort action. Despite the fact that nothing in the no-fault act governing "ordinary and necessary services" has changed since 1991, the majority casts aside the well-established interpretation of MCL 500.3135(3)(c) and now holds that excess expenses for "ordinary and necessary services" are no longer recoverable. The majority's decision is especially troubling because it ignores the obvious intent of the Legislature and, in doing so, creates conflicting and illogical rules regarding the collection of no-fault benefits. Because I see no compelling reason to impose this quagmire on the no-fault system, I respectfully dissent.

The general rule in third-party tort actions is that only noneconomic expenses are recoverable. However, certain statutory exceptions to this general rule exist. The issue before us is whether excess expenses for "ordinary and necessary services," payable under MCL 500.3107(1)(c), qualify as a designated exception. MCL 500.3135(3)(c) governs this issue. It provides:

> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished except as to:
>
> * * *
>
> (c) *Damages for allowable expenses, work loss, and survivor's loss as defined in* [*MCL 500.3107 to 500.3110*] *in excess of the daily, monthly, and 3-year limitations con-*

[1] "Ordinary and necessary services" are commonly referred to as "replacement services."

> *tained in those sections*. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured. [Emphasis added.]

Under this subdivision, "[d]amages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections"[2] may be recovered in a third-party action. The majority holds that because expenses payable for ordinary and necessary services under MCL 500.3107(1)(c)[3] is a separate category of expenses that is not specifically referred to in MCL 500.3135(3)(c), excess expenses for those services are no longer recoverable in a third-party tort action. I disagree. When the language of these provisions is read in concert with the no-fault act as a whole, it is clear that the majority misconstrues the language of the subdivisions involved and interprets them in a manner that is not consistent with the legislative intent.

The most important task in interpreting a statute is to determine the legislative intent,[4] and "consideration of the whole act should govern in its interpretation."[5] Thus, at the outset, it is our duty to determine if the

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[2] MCL 500.3135(3)(c).

[3] MCL 500.3107(1)(c) provides:

> Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

[4] *Potter v McLeary*, 484 Mich 397, 410-411; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[5] *Harrow v Metro Life Ins Co*, 285 Mich 349, 356; 280 NW 785 (1938).

Legislature intended to include "ordinary and necessary services" expenses within the purview of MCL 500.3135(3)(c). Moreover, in order to give due respect to the Legislature, statutes " 'must be construed to prevent absurd results . . . .' "[6] When the no-fault act is read as a whole,[7] it is clear that the Legislature intended to allow recovery of excess "ordinary and necessary services" expenses in tort actions. To interpret MCL 500.3135(3)(c) as the majority does requires a systematic dismantling of significant sections of the no-fault act and produces absurd results.

It is undisputed that, before the enactment of 1991 PA 191, expenses for excess ordinary and necessary services were recoverable in a third-party tort action. Before the statute was amended, "ordinary and necessary services" were part of "work loss" damages as defined in MCL 500.3107(b), as added by 1972 PA 294. *Swantek v Automobile Club of Michigan Insurance Group*[8] interpreted that version of MCL 500.3107(b) and found that the Legislature clearly intended that

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[6] *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010), quoting *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); see, also, *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 110; 718 NW2d 784 (2006) (KELLY, J., dissenting) ("The principle that statutes should be construed to avoid absurd results that are manifestly inconsistent with legislative intent is not a new or radical innovation.").

[7] In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980). The statute must be read as a whole. See *Sun Valley*, 460 Mich at 237. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[8] *Swantek v Auto Club of Mich Ins Group*, 118 Mich App 807; 325 NW2d 588 (1982).

excess expenses for ordinary and necessary services be recoverable in a third-party tort action. The Court explained:

> Under the no-fault act, an insured may collect from his insurer for limited economic loss, *i.e.*, work loss, [ordinary and necessary] services, and medical and funeral expenses without regard to fault. MCL 500.3105(2), 500.3107. An insured may also sue the negligent tortfeasor for excess economic loss. MCL 500.3135(2)(c). It is clear that the Legislature has divided an injured person's economic loss into two categories: loss for which the no-fault insurer is liable and loss for which the tortfeasor is liable.
>
> *The right of action against the tortfeasor for excess economic loss exists in all categories in which the insurer's liability is limited by the statute: work loss, funeral cost, and* [*ordinary and necessary*] *services.*[9]

In 1991 PA 191, the Legislature separated expenses for "ordinary and necessary services" from "work loss," moving them from former MCL 500.3107(b) into a newly numbered subsection, MCL 500.3107(1)(c). Notably, the Legislature did not amend any other corresponding provisions within the no-fault act to reflect that it intended to create a new hybrid category of benefits with different rules applicable to the recovery of those expenses. In other words, there is no language in 1991 PA 191 that implies or suggests that the Legislature intended that ordinary and necessary services be treated differently before and after the amendment.[10] While the majority finds that the absence of such language in the no-fault act creates an "obvious tension," resulting in a "difficult interpretive task,"[11] I

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[9] *Id*. at 809 (emphasis added; citations omitted).

[10] The no-fault community, including insurers and insureds, has accepted *Swantek*'s interpretation as controlling law notwithstanding the enactment of 1991 PA 191.

[11] *Ante* at 188.

disagree. The 1991 amendment was not complex, nor does it require a difficult interpretive task. One need only consider the purpose of the amendment and interpret the provision in a manner that is consistent with the no-fault act as a whole to come to the inescapable conclusion that the majority simply misconstrues this statutory provision and in doing so disregards legislative intent.

The amendment of MCL 500.3107 by 1991 PA 191 was only intended to make changes with regard to work-loss benefits for persons over the age of 60. The amendatory act added MCL 500.3107(2), which allowed persons 60 years of age or older to waive coverage for work-loss benefits by signing a waiver on a form provided by the insurer. Nothing in the legislative history indicates that any change was intended with respect to the recovery of excess expenses in third-party tort actions. The house legislative analysis explained:

> The bill would amend Chapter 31 of the Insurance Code, which deals with no-fault automobile insurance, to allow people 60 years of age and older to waive coverage for work loss benefits if they would not be eligible to receive them in the event of an accidental bodily injury (in an auto accident). . . . The waiver of coverage would only apply to benefits payable to the person or persons who had signed the waiver form.
>
> Currently, work loss benefits cover 1) the loss of income from work . . . and 2) expenses up to $20 per day incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed for himself or herself, or for a dependent, during the three years following injury. . . . The waiver of work loss benefits permitted under the bill would only apply to loss of income from work. [House Legislative Analysis, HB 4041, January 14, 1992, p 1.]

Thus, nothing in the language of the statute itself or in the legislative history supports the assertion that the Legislature intended to change the way that ordinary and necessary services were treated merely because benefits for expenses for those services were separated from benefits for lost work income. The only change intended was providing a mechanism for individuals over the age of 60 to reduce their premiums by waiving work-loss benefits.

I also find the majority's analysis of the text of MCL 500.3135(3)(c) lacking because it fails to consider all the language in the provision. The majority insists that the phrase "allowable expenses" in MCL 500.3135(3)(c) can only be read as having the same precise meaning as the phrase "allowable expenses" has in MCL 500.3107(1)(a). However, the full language of MCL 500.3135(3)(c) allows recovery in third-party tort actions of "[d]amages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to 500.3110] *in excess of the daily, monthly, and 3-year limitations contained in those sections*." (Emphasis added.) The majority's reading of the text ignores the balance of that sentence, which specifically provides that only those expenses that are *in excess of the prescribed limitations* are recoverable. The prescribed limitations are "daily, monthly, and 3-year limitations." The majority's analysis seemingly ignores the fact that there are no daily, monthly, or three-year limitations imposed on "allowable expenses" as enumerated in MCL 500.3107(1)(a). Under the majority's interpretation, the phrase "allowable expenses" within MCL 500.3135(3)(c) would be rendered meaningless because there are no allowable expenses, as enumerated in MCL 500.3107(1)(a), in excess of the "daily, monthly or 3-year limitations." Such damages simply do not exist.

Thus, the more logical interpretation of the text of MCL 500.3135(3)(c) is that it permits recovery of any excess expense, as long as the expense is "allowed" under the no-fault act and is subject to a daily, monthly, or three-year limitation. This interpretation is not new or novel; rather, it has been used by insureds and insurers since the adoption of the no-fault act. It is obvious that this interpretation is consistent with the scheme and organization of the no-fault act. Moreover, I cannot agree with the majority that the phrase "allowable expenses" as used in MCL 500.3135(3)(c) has been an "empty vessel" since it was enacted.[12] The majority simply fails to acknowledge that the phrase had meaning until today, and it is only under the majority's new interpretation of this subdivision that the phrase becomes meaningless.

Further, the majority's interpretation transforms expenses for ordinary and necessary services into some type of phantom category of benefits, subject to no discernible rules. This illogical and absurd outcome is best illustrated by understanding the chaotic consequences that will result from the majority's sudden departure from the historical rule.[13] For example, if expenses for excess ordinary and necessary services are no longer recoverable in tort actions simply because they are not specifically referred to in MCL 500.3135(3)(c), then it is also necessary to conclude that claims for "ordinary and necessary services" do not accrue when they are incurred as set forth in MCL 500.3110(4) because that provision also does not spe-

[12] *Ante* at 189.

[13] Given that members of the majority are in complete disagreement among themselves regarding the proper use or existence of the absurd-results doctrine, I find it ironic that the majority is so highly critical of my use of the concept.

cifically refer to "ordinary and necessary services."[14] Thus, insureds and insurers are left with no guidance at all regarding when these benefits accrue.

Similarly, this newly crafted interpretation of MCL 500.3135(3)(c) significantly affects the mandates of MCL 500.3145(1), which provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent *allowable expense, work loss or survivor's loss* has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

Under the majority's analysis of MCL 500.3135(3)(c), expenses for ordinary and necessary services are no longer subject to the second sentence of MCL 500.3145(1) because those expenses are not specifically referred to. In practical terms, does this mean that the

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[14] MCL 500.3110(4) provides:

> Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the *allowable expense, work loss or survivors' loss* is incurred. [Emphasis added.]

time for filing a lawsuit to recover expenses for ordinary and necessary services is now governed only by the first sentence of MCL 500.3145(1), and that a lawsuit must be brought within one year from the date of an accident without regard to whether the benefits are overdue or the services have even been performed? Additionally, MCL 500.3107(1)(c) provides for the payment of PIP benefits for expenses incurred in obtaining ordinary and necessary services for the first three years after the date of the accident. Is the majority suggesting that the final two years of services cannot be recovered in a lawsuit, or is the majority suggesting that an injured party wishing to preserve his or her rights must bring a lawsuit even before services are rendered? It is hard to imagine a more chaotic, illogical, and absurd system for insureds and insurers to navigate.[15]

I can see no logical basis to conclude that the Legislature intended this chaotic and arbitrary approach to the collection of no-fault benefits. It is our duty to interpret statutes in accordance with legislative intent, using sound logic and reasoning. The far more reasonable interpretation recognizes that the Legislature intended MCL 500.3135(3)(c) to allow excess expenses for ordinary and necessary services to be recovered in a third-party tort action.

Moreover, it is also important to recognize that the notion of expenses for ordinary and necessary services being recoverable in third-party tort actions is so well established and universally accepted that it has been incorporated into our Model Civil Jury

[15] Under the majority's interpretation, MCL 500.3116(4) (the subtraction-or-reimbursement provision for no-fault insurers) is also implicated. Thus, under the majority's interpretation, no-fault insurers can no longer seek recoupment of expenses for ordinary and necessary services in accordance with MCL 500.3116(4) because it also does not use the specific phrase "ordinary and necessary services."

Instructions. M Civ JI 36.15 explicitly recognizes the previously undisputed rule that excess expenses for ordinary and necessary services are recoverable in third-party tort actions. While jury instructions are not binding statements of the law, the recognition of this principle within the Model Civil Jury Instructions speaks loudly to the general acceptance of, and reliance by all parties on, this interpretation.

Finally, two members of today's majority found this same position persuasive in the past. In *Kreiner v Fischer*,[16] Justices YOUNG and MARKMAN agreed that under MCL 500.3135(3)(c), "[a]n injured person may file a tort claim against the party at fault seeking to recover *excess* economic losses (wage losses and [ordinary and necessary services] expenses beyond the daily, monthly, and yearly maximum amounts)." Given the unequivocal nature of the position taken by Justices YOUNG and MARKMAN on this issue, I find it difficult to accept that they now casually disregard that position simply because it was said in dictum.

While the majority claims it has no choice but to interpret the act in this fashion, I disagree. It is the duty of this Court to interpret statutes in accordance with the intent of the Legislature and in a manner that does not produce absurd results. Accordingly, I respectfully dissent.

MARILYN KELLY, J., concurred with HATHAWAY, J.

CAVANAGH, J. I concur in the result proposed by Justice HATHAWAY's dissenting opinion.

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[16] *Kreiner v Fischer*, 471 Mich 109, 114 n 2; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180 (2010).

In re RECEIVERSHIP OF 11910 SOUTH FRANCIS ROAD
(PRICE v KOSMALSKI)

Docket No. 143123. Argued March 7, 2012 (Calendar No. 9). Decided July 30, 2012.

Nastassia Price and Erin Duffy-Price, as personal representatives of the estate of Darryl H. Price, brought an action in the Ingham Circuit Court to collect a judgment against Lori Jean Kosmalski and others, seeking a lien against certain property, which was owned by Kosmalski and subject to a preexisting mortgage held by Dart Bank. At the request of Price and Duffy-Price, the court, William E. Collette, J., appointed Thomas Woods as receiver, and, in accordance with the receivership order, he took possession of the property and financed substantial repairs in order to make the property saleable. By the time the court entered its receivership order, Kosmalski had already defaulted on the mortgage and Dart had begun foreclosure-by-advertisement proceedings. Following the expiration of the statutory redemption period, Dart purchased the property at the foreclosure sale for the balance due on its mortgage. Woods subsequently moved to void the foreclosure sale, at which point Dart intervened in opposition. The court denied Woods's motion but extended the statutory redemption period, during which Woods was still unable to find a competitive buyer. When the extended redemption period expired, Woods moved to hold Dart liable for payment of his costs and fees. The court granted Woods a lien on the net proceeds from the sale of the property for the amount of the receivership costs and gave this lien priority over Dart's preexisting mortgage. Dart appealed. The Court of Appeals, O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ., affirmed, holding that the holder of a prior recorded mortgage may be required to pay the costs of a receivership when it benefited from the receivership, irrespective of the fact that the holder of the prior recorded mortgage did not explicitly consent to the receivership or become a party to the case until after the receiver was appointed. 292 Mich App 294 (2011). The Supreme Court granted Dart leave to appeal. 490 Mich 902 (2011).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices MARKMAN and ZAHRA, the Supreme Court *held*:

The common-law rule that a receiver is entitled to be paid for his or her services on a first-priority basis does not apply in the context of a foreclosure by advertisement under MCL 600.3236, which provides that the purchaser of a sheriff's deed following a foreclosure by advertisement receives the same title that the mortgagor had at the time the mortgage was executed and that only prior subsisting liens affect the purchaser's interest.

1. In essence, Michigan has had the same foreclosure-by-advertisement statute since 1846. The statute, MCL 600.3236 as currently codified, provides that the purchaser of a sheriff's deed following foreclosure by advertisement takes the same title that the mortgagor had at the time the mortgage was executed and that only prior subsisting liens affect the purchaser's interest. The statute renders absolute the mortgagee's title to the property it purchased in the foreclosure proceeding, extinguishing any right, title, and interest created after the mortgage was executed. However, lienholders whose interests preexisted the execution of the mortgage will have the same rights following foreclosure as those previously held at the time the mortgage was executed. Thus, under the statute, the order of priority at the time of the mortgage's execution must be maintained after the foreclosure sale. Accordingly, the statute requires that any interests in property created after the mortgage was executed will be extinguished upon expiration of the redemption period after a sheriff's sale, but any interests preexisting the mortgage's execution will not be affected by the sale and the grantee under a sheriff's deed will take the property subject to those preexisting interests. Because Dart foreclosed on the property by advertisement, MCL 600.3236 applied and Dart's first-recorded mortgage had first priority, given that no other liens existed when the mortgage was executed. Under the statute, the receiver's lien, which was created after the execution of Dart's mortgage, could not prejudice Dart's priority interest.

2. The common-law rule that a receiver's unpaid fees and compensation, which are in the nature of administrative costs, may be paid from the property or funds held in receivership before those funds are made available to prior creditors has not been applied in Michigan to divest the purchaser of a sheriff's deed of his or her statutory right of priority. Application of the common-law rule would irreconcilably conflict with the application of MCL 600.3236. Accordingly, when a receiver's lien postdates the mortgage subject to foreclosure under the statute, the receiver's lien must be subordinated to the interests of the purchaser and any prior lienholders.

3. A mortgagee may waive its statutory right to first-priority satisfaction of its lien if the waiver is explicitly and unequivocally given. However, consistently with Michigan's waiver jurisprudence, a mortgagee's failure to object to the appointment of a receiver or acquiescence in the appointment generally does not constitute waiver and the Court of Appeals erred by holding to the contrary. Nor is there any legal authority to support the Court of Appeals' conclusion that a party merely benefiting from a receivership may be liable for the receiver's costs and fees. The mere receipt of a benefit as the result of the receiver's actions does not justify disregarding MCL 600.3236. Only when the mortgagee has unequivocally waived the statutory right of first priority will the receiver be entitled to prior satisfaction of his or her expenses consistently with the common-law rule. Because Dart did not explicitly waive its statutory right of priority, the receiver was precluded from recovering the receivership expenses from Dart.

4. When there are insufficient funds to satisfy the receiver's costs and fees upon termination of the receivership, MCR 2.622(D) permits a circuit court on application of the receiver to set the receiver's compensation and require the party requesting the receivership to bear the costs associated with the receivership.

Reversed; case remanded to the circuit court for entry of an order releasing the escrow funds in favor of Dart Bank.

Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, dissenting, disagreed that a mortgagee only waives its right of superior priority under MCL 600.3236 if the mortgagee expressly consents to the receivership or the reordering of priorities, and would have held that a mortgagee may also waive its right if the mortgagee acquiesces to and benefits from the receivership. Michigan caselaw demonstrates that a waiver may occur by way of acquiescence. In this case, Dart acquiesced to the receivership because it never objected to the receiver's actions despite its knowledge of the receiver's efforts, indicated a willingness to work with the receiver, engaged in affirmative conduct sufficient to show that it had waived a known right, and benefited from the receiver's efforts to repair, preserve, and protect the property.

1. MORTGAGES — FORECLOSURE BY ADVERTISEMENT — INTERESTS PREEXISTING THE EXECUTION OF A MORTGAGE — INTERESTS CREATED AFTER THE EXECUTION OF A MORTGAGE — PRIORITY.

MCL 600.3236 provides that the purchaser of a sheriff's deed following foreclosure by advertisement takes the same title that the mortgagor had at the time the mortgage was executed and that only prior subsisting liens affect the purchaser's interest; the

statute requires that any interests in property created after the mortgage was executed will be extinguished upon expiration of the redemption period after a sheriff's sale, but any interests preexisting the mortgage's execution will not be affected by the sale and the grantee under a sheriff's deed will take the property subject to those preexisting interests.

2. MORTGAGES — FORECLOSURE BY ADVERTISEMENT — RECEIVER'S LIEN — PRIORITY.

When a receiver's lien postdates a mortgage subject to foreclosure by advertisement, the receiver's lien must be subordinated to the interests of the purchaser and any lienholders whose interests preexisted the execution of the mortgage; the common-law rule that a receiver's unpaid fees and compensation may be paid from the property or funds held in receivership before those funds are made available to prior creditors does not apply to statutory foreclosures by advertisement (MCL 600.3236).

3. MORTGAGES — FORECLOSURE BY ADVERTISEMENT — PRIORITY — WAIVER OF PRIORITY.

A mortgagee may waive its statutory right to first-priority satisfaction of its lien following statutory foreclosure by advertisement if the waiver is explicitly and unequivocally given, but a mortgagee's failure to object to the appointment of a receiver or acquiescence in the appointment generally does not constitute waiver (MCL 600.3236).

4. COSTS — RECEIVERSHIPS — LIABILITY FOR COSTS.

Upon application of the receiver, when there are insufficient funds to satisfy the receiver's costs and fees upon termination of a receivership, the circuit court may set the receiver's compensation and require the party requesting the receivership to bear the costs associated with the receivership (MCR 2.622[D]).

Allan Falk, P.C. (by *Allan Falk*), and *Cummins Woods* (by *Thomas E. Woods*) for Thomas E. Woods.

The Hubbard Law Firm, P.C. (by *Peter A. Teholiz* and *Michael G. Woodworth*), for Dart Bank.

Amici Curiae:

Kus, Ryan & Associates, PLLC (by *Michael A. Kus*, *Marsha J. Greco*, and *Jeffrey S. Horowitz*), for the Community Bankers of Michigan.

Warner Norcross & Judd LLP (by *Jeffrey O. Birkhold*, *James H. Breay*, and *Nicole L. Mazzocco*) for the Michigan Bankers Association and the Michigan Credit Union League.

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Realtors.

MARY BETH KELLY, J. This case involves the issue of the priority of competing liens between a court-appointed receiver and the holder of a first-recorded mortgage on real property located in DeWitt, Michigan. The receiver, Thomas Woods, seeks to recover receivership expenses *before* the holder of the first-recorded mortgage, Dart Bank, satisfies its mortgage interest. In affirming the circuit court's order placing a first-priority lien on the property in the amount of the receiver's expenses, the Court of Appeals relied, in part, on this Court's decisions in *Bailey v Bailey*[1] and *Fisk v Fisk*[2] and its own decision in *Attica Hydraulic Exchange v Seslar*,[3] to hold that because Dart did not object to and benefited from the receivership, it therefore "may be held responsible for the receivership expenses."[4] We granted Dart's application for leave to appeal to determine whether the common-law rule that receivership expenses are entitled to first priority is controlling, notwithstanding that the holder of a prior recorded mortgage is statutorily entitled to priority under MCL 600.3236, and whether a mortgagee must explicitly

[1] *Bailey v Bailey*, 262 Mich 215; 247 NW 160 (1933).

[2] *Fisk v Fisk*, 333 Mich 513; 53 NW2d 356 (1952).

[3] *Attica Hydraulic Exch v Seslar*, 264 Mich App 577; 691 NW2d 802 (2004).

[4] *In re Receivership of 11910 South Francis Road (Price v Kosmalski)*, 292 Mich App 294, 299; 806 NW2d 750 (2011).

consent to the receivership before the mortgagee may be required to pay those sums associated therewith.

Before Michigan became a state, English courts developed the general rule that a receiver is entitled to be paid for his or her services on a first-priority basis. In 1846, Michigan revised and consolidated its statutes. Included within the revised statutes was 1846 RS, ch 130, § 10, which provided that the purchaser of a sheriff's deed following a foreclosure by advertisement holds the same title that the mortgagor had at the time the mortgage was executed and that only prior subsisting liens affected the purchaser's interest. In all material respects, the statute has remained unchanged since 1846 and currently exists as MCL 600.3236. Following adoption of the pertinent foreclosure-by-advertisement statute in 1846, this Court applied the English common-law rule in situations not involving foreclosure by advertisement. So far as we can discern, the common-law rule has never been applied in Michigan to divest the purchaser of a sheriff's deed of the purchaser's statutory right of priority.

This case requires us to determine whether this general common-law rule permitting the court to give priority to a receiver should be extended to the foreclosure-by-advertisement context even though application of that rule would contradict the priorities established by a statute that has been in existence since 1846.

We decline to extend the common-law rule to the situation before us. Rather, we hold that MCL 600.3236 controls and, by its plain language, requires that any liens preexisting the mortgage that is the subject of the foreclosure remain in the same order of priority as they existed at the time of the mortgage's execution. Assuming a receiver's lien postdates the mortgage subject to

foreclosure under MCL 600.3236, as the receiver's lien does here, it is clear that the receiver's interest under the lien will be subordinated to the interests of the purchaser and any prior lienholders. Further, it is clear from our caselaw that a mortgagee may waive its right of first-priority satisfaction of its lien. Thus, we also hold that a mortgagee that forecloses consistently with MCL 600.3236 may waive its statutory right of priority and, if that occurs, the receiver may be entitled to compensation before the mortgagee, but only if the mortgagee's waiver is explicitly and unequivocally given.

Because the Court of Appeals in this case failed to recognize the applicability of MCL 600.3236 and erroneously extended the holdings in *Bailey* and *Fisk* to support its conclusion that even in the absence of affirmative consent, Dart could nevertheless be required to pay the receiver's costs and fees, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for entry of an order releasing the escrow funds in favor of Dart.

I. FACTS AND PROCEDURAL HISTORY

The real property involved in this action was previously owned by Rudaford Sterrett, Jr., and secured by a single mortgage held by Dart, which was duly recorded on August 8, 2003. Upon Sterrett's death in April 2007, the real property was bequeathed to Lori Jean Kosmalski. At that time, the property was valued at $350,000, and the mortgage balance was less than $170,000.

In September 2007, Nastassia Price and Erin Duffy-Price instituted an action against Kosmalski to collect a judgment in an unrelated lawsuit. When they learned that Kosmalski had inherited the real property from Sterrett, they moved for the appointment of a receiver to

seize and sell the real property in order to satisfy all or part of the judgment against Kosmalski. Dart was not provided notice of Price and Duffy-Price's motion for receivership.

In April 2008, the circuit court granted Price and Duffy-Price's request for receivership and appointed Thomas Woods as receiver.[5] One week later, the circuit court entered an amended stipulated order of appointment, which authorized the receiver to take immediate possession of the property and keep, manage, operate, and preserve it until further order of the circuit court. The powers and duties conferred on the receiver incident to his appointment included the authority to expend the property's equity or borrow funds for the repair, maintenance, and operation of the property necessary to preserve the property and make it saleable. Because the property was uninhabitable, the receiver borrowed approximately $20,000 to finance substantial repairs. These repairs included cleaning the home and its grounds, repairing the heating and air conditioning systems, installing an alarm system, repairing the water system and pool area, and installing a fence.

Approximately one month before the receiver's appointment, Kosmalski had defaulted on the mortgage, and Dart initiated foreclosure proceedings by advertisement in mid-April 2008.[6] At the June 5, 2008, sheriff's sale, Dart—the sole bidder—purchased the property for $169,312.50, which was the balance due on its mort-

[5] On April 18, 2008, Dart's former counsel, Jon Jenkins, acknowledged by facsimile his receipt of the circuit court's April 10, 2008, receivership order. However, in an affidavit dated May 20, 2009, Jenkins asserted that it was not until after initiation of the foreclosure process that Dart learned of the receivership order.

[6] In a letter dated May 27, 2008, the receiver acknowledged that he was aware of Dart's foreclosure action and indicated that he did not intend to interfere with the process.

gage, and obtained a sheriff's deed to the property subject to a one-year redemption period.[7] On May 18, 2009, the receiver moved to void the sale, arguing that Dart had violated the court's receivership order, which prohibited any interference with the receiver's possession and management of the property. Dart subsequently intervened in opposition to this motion, asserting that Dart had validly initiated foreclosure proceedings and that, during the pendency of the redemption period, it had not interfered with the receiver's possession of the property. The circuit court denied the receiver's motion but extended the redemption period until August 25, 2009, to allow the receiver additional time to sell the property. When the receiver was unable to sell the property within the extended redemption period, Dart received title to the property effective August 26, 2009.

In October 2009, the receiver filed a motion seeking to hold Dart liable for payment of the costs and fees incurred in the administration of the receivership. The receiver claimed $41,874.57 in total expenses, which reflected the costs incurred in repairing, maintaining, and attempting to sell the property, fees for his professional services, and costs for attorney fees incurred as a result of the receiver's motions to enforce the receivership order. At the motion hearing, the receiver argued that because Dart had acquiesced in the receivership and the receiver's expenditures, he was entitled to reimbursement of his costs and fees from Dart. Dart responded that it could not be charged with the receiver's costs and fees when it had not consented to those surcharges.

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[7] The property was reappraised on June 6, 2009. At that time, the value of the property had fallen to $245,000.

The circuit court accepted the receiver's argument and entered an order on November 5, 2009, approving the receiver's final report and granting the receiver a lien on the net proceeds from the sale of the property in the amount of $41,874.57, which was given priority over Dart's preexisting mortgage. The lien order further required that the receiver relinquish possession of the property to Dart and discharged the receiver and canceled his bond.[8]

Dart appealed as of right the circuit court's order granting the receiver a first-priority lien over the property, arguing that a receiver is not entitled to any greater rights than the original owner would have had and, therefore, the receiver took title to the property subject to Dart's preexisting mortgage. The Court of Appeals affirmed and, citing *Bailey*,[9] *Fisk*,[10] and *Attica*,[11] held that Dart could be held responsible for the receivership expenses.[12] Under its interpretation of these cases, the Court of Appeals concluded that even without explicitly consenting to the receiver's appointment, Dart could nevertheless be required to pay the receiver's costs and fees because it benefited from the receivership.[13]

We granted leave to appeal to consider, in relevant part, "whether the statutory right of first priority

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[8] Dart raised for the first time in its application for leave to appeal in this Court the applicability of MCR 2.622(D), which confers on the circuit court the discretion to direct the party who sought the appointment of the receiver to pay the receivership expenses. Thus, the circuit court did not consider the relevance of the court rule when it granted relief in favor of the receiver.

[9] *Bailey*, 262 Mich 215.

[10] *Fisk*, 333 Mich 513.

[11] *Attica*, 264 Mich App 577.

[12] *In re Receivership*, 292 Mich App 294.

[13] *Id*. at 299.

belonging to the holder of the recorded mortgage, MCL 600.3236, overrides the common-law rule that a receiver's costs and fees are entitled to first priority" and "whether a mortgagee must affirmatively consent to the appointment of a receiver to be required to pay the receiver's costs and fees . . . ."[14]

II. STANDARD OF REVIEW

Whether the circuit court had the authority to order the holder of a first-recorded mortgage to pay for the expenses of a receivership to which it did not explicitly consent is a question of law that this Court reviews de novo.[15] Questions of statutory interpretation are also reviewed de novo.[16] A circuit court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo.[17]

III. ANALYSIS

Dart asserts that it has a statutory right to first priority under MCL 600.3236 and that its mortgage interest cannot be made subordinate to subsequently incurred receivership expenses. The receiver, on the other hand, argues that a common-law rule grants a receiver's expenses first priority, despite the existence of any preexisting liens on the property. Resolution of this dispute first requires an understanding of the common-law principles that have developed on the issue of the priority of payment of receivers' liens.

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[14] *In re Price Estate (Price v Kosmalski)*, 490 Mich 902 (2011). Because these issues are dispositive to the resolution of this appeal, it is unnecessary to address the third issue in our order granting leave.

[15] *Attica*, 264 Mich App at 588.

[16] *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008).

[17] *Hendee v Putnam Twp*, 486 Mich 556, 566; 786 NW2d 521 (2010).

A. THE COMMON LAW

It is well established that our common law is descended from England,[18] and, consequently, the law of receiverships in Michigan is generally adopted from English common law. As far back as 1759, the English Court of Chancery recognized that the "master is to allow [a receiver] a reasonable salary for his care and pains therein."[19] In the event that a competing property interest existed, as in the present case, the English Court of Chancery and the Court of Common Pleas consistently held that a receiver was entitled to this "reasonable salary" for the receiver's services and expenditures on a first-priority basis regardless of which party ultimately prevailed or was held liable to pay for the receiver's services and expenditures.[20]

We noted this common-law rule in *In re Dissolution of Henry Smith Floral Co*[21] when we held that "the compensation of the receiver and his counsel are part of court administrative costs and entitled to priority over

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[18] *In re Lamphere*, 61 Mich 105, 108; 27 NW 882 (1886).

[19] *Carlisle v Lord Berkley*, 27 Eng Rep 390; Ambler's Rep 599 (Ch, 1759).

[20] See *Malcolm v O'Callaghan*, 40 Eng Rep 844; 3 Myl & Cr 52; SC 1 Jur (OS) 838 (Ch, 1837) (holding that a receiver is entitled to have out of the funds collected or realized by him his costs and fees properly incurred in the discharge of his duties as receiver); *Morison v Morison*, 4 Myl & Cr 215 (Ch, 1838) (in a suit to administer a West Indian estate, a court-appointed consignee was held entitled to repayment out of the corpus of the estate his costs and fees, which were to be given priority over competing claims in the suit); *Gilbert v Dyneley*, 133 Eng Rep 1038; 3 Man & G 12; SC 3 Scott, NR 364; 5 Jur 843 (1841) (holding that the receiver was entitled to deduct from the moneys received by him the reasonable costs and fees he incurred in the administration of the receivership *before* applying those, in whole or in part, in satisfaction of the outstanding mortgage interest).

[21] *In re Dissolution of Henry Smith Floral Co*, 260 Mich 299, 301-302, 306; 244 NW 480 (1932).

receiver's certificates constitut[ing] a first lien on [the] assets."[22] The Court reasoned:

> The compensation of a receiver and his attorneys is out of funds or property *in custodia legis*, and no lien, authorized by the court, on the funds or property has priority of such court administrative costs. The lien, granted holders of the receiver's certificates, was not superior to such administrative costs. *Administrative costs are not at all of the nature of a lien, and a first lien on assets has no priority of such court costs and expenses*.[23]

One year later in *Detroit Trust Co v Detroit City Service Co*,[24] we likewise applied this general common-law rule when we held that the receivers were entitled to deduct their fees and expenses from profits earned in the operation of the business held in receivership, proceeds from the sale of the equity of redemption, and proceeds from the sale of unmortgaged property before those funds were distributed as dividends to creditors.[25] And later, in *In re Rite-Way Tool & Mfg Co*,[26] wherein this Court addressed whether the liquidation proceeds of personal property held in receivership should be applied toward property taxes assessed on the receivership property before satisfying the preexisting mortgage indebtedness, this Court similarly held that receiver's costs were entitled to first priority. We stated:

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[22] *Id*. at 302-303.

[23] *Id*. at 302 (emphasis added).

[24] *Detroit Trust Co v Detroit City Serv Co*, 262 Mich 14, 51-53; 247 NW 76 (1933).

[25] See *id*. at 51 (directing the trial court to "estimate[] and deduct[] . . . the further expenses of the receivership . . . that must be paid from such profits *before they become available for dividend purposes*") (emphasis added), and *id.* at 52 ("In determining the amount of the dividends to be paid, a fair sum should be estimated and *deducted for fees of the receiver*, attorneys, and for all other lawful charges.") (emphasis added).

[26] *In re Rite-Way Tool & Mfg Co*, 333 Mich 551; 53 NW2d 373 (1952).

> [T]he receiver should *first apply funds* received from liquidation of the receivership assets (including the chattel mortgaged property) *in payment of the costs of administration of the receivership*, including taxes herein involved, and the fees of the receiver and his attorney as fixed by the court; and thereafter in the following order apply receivership funds in his hands in payment of (2) the chattel mortgages; (3) claims of general creditors; and (4) the balance of such funds, if any, to the partners.[27]

Henry Smith, *Detroit Trust Co*, and *Rite-Way Tool*, therefore, applied the common-law rule that the receiver invokes here: that a receiver's unpaid fees and compensation, which are in the nature of "administrative costs," may be paid from the property or funds held in receivership before those funds are made available to prior creditors. None of those cases, however, involved foreclosure by advertisement. And while the pertinence of the common-law rule seems apparent, the Court of Appeals erred by failing to recognize that a provision of the foreclosure-by-advertisement statute, MCL 600.3236, is directly applicable to this matter and that no Michigan case has applied the common-law rule in this context.[28]

B. STATUTORY RIGHT OF PRIORITY

Notwithstanding the receiver's contrary assertion, the plain language of MCL 600.3236 creates a statutory

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[27] *Id.* at 558-559 (emphasis added).

[28] The issue whether the rule from these cases continues to apply outside of the context presented in this case is not before us, and we leave resolution of that question for another day. Further, we do not speculate whether, absent the statute, the receiver in this case would have been entitled to superior priority over Dart as the mortgagee because, assuming that the general common-law rule would have applied in those circumstances, it is not ascertainable from what source the receiver's compensation would have been payable given the function of MCR 2.622(D). See note 8 of this opinion.

right of priority.[29] When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent.[30] The best indicator of that intent is the language used.[31] When construing statutory language, we must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined.[32] If statutory language is clear and unambiguous, then judicial construction is neither required nor permitted, and the statute must be applied as written.[33]

MCL 600.3236 describes the legal effect of a sheriff's deed obtained at a foreclosure sale upon the expiration of the applicable redemption period.[34] The statute provides in full:

> Unless the premises described in such deed shall be redeemed within the time limited for such redemption as

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[29] The first version of this statute was enacted in 1844 and subsequently included in the 1846 revision and consolidation of the statutes, nearly 10 years after Michigan became a state. See 1846 RS, ch 130, § 10 and 1844 PA 40, § 6 (establishing that the purchaser of a sheriff's deed acquires the interest held by the mortgagor at the time the mortgage was executed). The provision underwent several minor amendments and was included in subsequent compilations before it was reenacted in 1961 as MCL 600.3236 (effective January 1, 1963), in the Revised Judicature Act (RJA), MCL 600.101 *et seq*. In all material respects, however, the statute has remained unchanged since 1846.

[30] *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

[31] *Id*.

[32] MCL 8.3a; *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002).

[33] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[34] If a mortgagor defaults on a mortgage containing a power of sale, like Dart's mortgage here, the property may be foreclosed on and sold at a sheriff's sale. See MCL 600.3201 through 600.3224. Upon that sale, the purchaser acquires a sheriff's deed, which only becomes effective if the mortgagor does not exercise his or her right of redemption within the applicable statutory window. See MCL 600.3228; MCL 600.3232; MCL 600.3240(1).

> hereinafter provided, such deed shall thereupon become operative, and *shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage*, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, *but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby*.[35]

The first clause under this provision describes the legal effect and operation of a deed upon the mortgagor's failure to exercise its statutory right of redemption following foreclosure. The first clause of MCL 600.3236 makes plain that if property is not redeemed within the applicable statutory window, then the deed becomes "operative," vesting in the grantee "all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage . . . ." This clause refers to those rights that existed at the time that the mortgage subject to foreclosure was executed. The grantee thus succeeds to the same rights—no greater and no fewer—as those held by the mortgagor when the mortgage was executed. By logical implication, this first clause renders absolute the mortgagee's title to the property it purchased in a foreclosure proceeding, extinguishing any "right, title, and interest" created subsequent to the creation of the mortgage being foreclosed upon, which includes liens created *after* the execution of the mortgage.[36]

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[35] Emphasis added.

[36] At oral argument, the receiver argued that the pertinent statutory language in this first clause is the phrase "or at any time thereafter,"

The last clause of MCL 600.3236, which is central to the legal question in this case, makes plain, however, that any interests *preexisting* the execution of the subject mortgage will not be prejudiced by a foreclosure sale. Specifically, the pertinent language of this clause provides that "no person having any valid subsisting lien upon the mortgaged premises . . . created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby." Although the statute does not define "valid subsisting lien," the next phrase qualifies that term to mean a lien "created before . . . such mortgage took effect . . . ."[37] The provision then

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which, according to the receiver, allows a court to subordinate a senior mortgage to a junior lien. Specifically, the receiver asserts that because Sterrett "has incurred a liability by virtue of the appointment of a receiver, and that affected his immediate title and therefore that's the same title that the bank has inherited." That interpretation cannot be reconciled with the plain text of MCL 600.3236. The phrase "or at any time thereafter" clearly refers to the mortgagor's positive title in the property. Thus, the phrase "or at any time thereafter" cannot be interpreted to mean that a subsequently imposed lien takes priority over the mortgagee's interest because that would nullify MCL 600.3236. Indeed, if the receiver's interpretation were accurate, then the last phrase of MCL 600.3236, which establishes the principle that only liens imposed before execution of the mortgage at issue are not prejudiced by foreclosure, would be contradictory. Further, the receiver's interpretation poses a practical dilemma to the extent that Sterrett's interest could never have been subject to the receivership lien given that he died 2½ years before its imposition.

[37] According to its plain language, MCL 600.3236 necessarily limits a "valid subsisting lien" to one that was created before the mortgage took effect because "subsist" means "to have existence[.]" *Webster's Third New International Dictionary, Unabridged Edition* (1965). To allow a lien that did not exist at the time the mortgage was executed to prejudice the purchaser's title would result in judicial subrogation, wherein the party with the statutory right of priority is displaced by the party favored by the court. When the Legislature has prescribed the order of priority, our courts may not vary it by resort to equity. Cf. *Stokes v Millen Roofing Co*, 466 Mich 660, 673; 649 NW2d 371 (2002) (holding that an unlicensed builder could not "have equitable relief because any such relief would

mandates that such liens "shall" not be "prejudiced" or "in any way affected" by the foreclosure sale. The clear import of this language is that those lienholders whose interests preexisted the mortgage's execution will have the exact same rights following foreclosure as those previously held at the time the mortgage was executed. It follows that the order of priority at the time of the mortgage's execution must be maintained after a foreclosure sale.[38]

When read as a whole, then, MCL 600.3236 requires that any interests in property created after the mortgage subject to foreclosure was executed will be extinguished upon expiration of the redemption period after a sheriff's sale; however, any interests preexisting the mortgage's execution will not be affected by "any such sale," and the grantee under a sheriff's deed will take the property subject to those preexisting interests. Accordingly, we hold that MCL 600.3236, by its plain language, requires that after a sheriff's sale and expiration of the redemption period, any lien preexisting the mortgage that was the subject of the foreclosure sale remains in the same order of priority as at the time of that mortgage's execution.

Because Dart foreclosed on the property by advertisement, MCL 600.3236 applies, and its application makes

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allow equity to be used to defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction"). This is particularly so here, given that this Court has provided a means to ensure that a receiver's expenses are paid by the party seeking to establish a receivership. See MCR 2.622(D).

[38] Michigan is a recording-priority jurisdiction and, thus, a recorded mortgage lien is held superior to any lien subsequently recorded. This rule, generally referred to as "first in time, first in right," is subject to several statutory exceptions that grant certain liens first priority no matter their time of creation. See MCL 324.20138(2) (environmental remediation costs), MCL 211.40 (real estate taxes), and MCL 570.1119(3) (construction liens). However, there is no statutory exception for receivership expenses.

clear that Dart's first-recorded mortgage has first priority, given that no other liens existed when the mortgage was executed. By operation of MCL 600.3236, any liens created after the execution of Dart's mortgage in 2003, which includes the receiver's lien created by order of the circuit court in 2009, could not prejudice Dart's priority interest.[39] The receiver argues, however, that the common-law rule controls and grants his lien first

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[39] This statutory priority rule is actually in accord with Michigan common-law priority rules established in related areas of law involving judicially created receiverships. Cf. *Gray v Lincoln Housing Trust*, 229 Mich 441; 201 NW 489 (1924), in which a receiver was appointed to manage the affairs of the failing trust, which held as an asset the plaintiff's mortgage. When the trust breached a related agreement with the plaintiff, the plaintiff filed suit against the trust to cancel the mortgage, and the receiver, who had been appointed after the plaintiff initiated suit, intervened to recover his compensation. The Court ruled in favor of the plaintiff, reasoning that " 'the relative rank of claims and the standing of liens remain unaffected by the receivership.' " *Id*. at 447, quoting 23 Ruling Case Law, § 118, p 108. The Court further stated:

> We think it must be taken as the settled law in this jurisdiction that the receiver does not take title as a *bona fide* purchaser but takes the assets subject to the equities existing between the parties. His title and right can be no greater than the one for whose assets he is receiver and in whose shoes he stands. [*Gray*, 229 Mich at 446.]

The rule articulated in *Gray* has been relied on in other cases. See *Uhl v Wexford Co*, 275 Mich 712, 715; 267 NW 775 (1936) (holding that a validly appointed receiver takes the assets of the property subject to those interests that existed between the parties at the time of his or her appointment); *Franklin Co v Buhl Land Co*, 264 Mich 531, 535; 250 NW 299 (1933) (holding that because the plaintiff's receiver was appointed after the commencement of the suit, the defendant's setoff of its judgment against the plaintiff did not lead to a preference over other creditors because a receiver takes the assets subject to equities existing between the parties at the time of his or her appointment); and *Stram v Jackson*, 248 Mich 171, 176; 226 NW 888 (1929) (holding that the purchaser of mortgaged property stands in the shoes of the mortgagor and can urge no defense to the mortgage not open to mortgagor); see also *Rickman v Rickman*, 180 Mich 224, 248, 250; 146 NW 609 (1914) (holding that a plaintiff who brings suit *before* the filing of a bill of dissolution of a firm acquired priority over other creditors,

priority over Dart's preexisting mortgage. We disagree with the receiver's argument because, while the general common-law rule pertaining to receivership priority has certainly been recognized throughout our jurisprudence, the caselaw on which the receiver relies demonstrates that this rule has not been applied in the foreclosure-by-advertisement context. Indeed, we are aware of no Michigan case that imposed the common-law rule as adopted from England so as to divest the purchaser of a sheriff's deed of his or her statutory right of priority pursuant to MCL 600.3236. To apply the common-law rule despite the imperative of the plain statutory language, providing the holder of a prior recorded mortgage with a right of priority over *all* subsequently created interests in the property, would impermissibly shift a receivership lien that is created subsequent to the time at which the mortgage subject to foreclosure took effect to the first-priority position. Because application of the common-law rule would irreconcilably conflict with application of MCL 600.3236, we decline to extend the common-law rule to circumstances like those presented here, in which MCL 600.3236 specifically controls the order of priority of preexisting competing liens, including receivership liens, after a foreclosure by advertisement.[40]

C. CONSENT

Relying on *Bailey*[41] and *Fisk*,[42] the receiver, like the Court of Appeals, nevertheless insists that he is entitled

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including the receiver, who takes only the rights of the firm and is affected by all claims, liens, and equities which would prevail against the firm).

[40] See *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n 8; 515 NW2d 728 (1994) (holding that if there "if there is a conflict between the common law and a statutory provision, the common law must yield").

[41] *Bailey*, 262 Mich 215.

[42] *Fisk*, 333 Mich 513.

to prior satisfaction of his costs and fees, even without Dart's explicit consent, on the basis that Dart acquiesced in the receivership. However, the receiver's assertion is wholly unsupported by our jurisprudence. In *Bailey*, this Court held that when a mortgagee consents to the appointment of a receiver as well as to the reordering of the priorities, the mortgagee may be charged with payment of the receiver's costs and fees. Likewise, in *Fisk*, the Court held that when a party agreed by stipulation to the appointment of certain receivers, that party was precluded from challenging payment of a receiver's compensation. Thus, both *Bailey* and *Fisk* are distinguishable from the facts of this case, given that it is undisputed that Dart did not explicitly consent to either the appointment of a receiver or to the reordering of the priorities.[43] Certainly, a party can waive its statutory rights.[44] No legal authority, however, justifies the extension of the rule articulated in *Bailey* and *Fisk* to circumstances like the present, in which the mortgagee failed to object to, or

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[43] Though Justice CAVANAGH does not disagree with our conclusion that *Bailey* and *Fisk* are more akin to our waiver jurisprudence and do not create a common-law rule that permits the mortgagee's priority to be subordinated without the mortgagee's explicit consent to the receivership, he curiously extends the holdings in those cases to conclude that acquiescence is sufficient to effect a waiver. However, the resolution reached in *Bailey* and *Fisk* appears to have been prompted by the Court's interest in preventing the mortgagee from *actually agreeing* that the receiver incur costs only to subsequently deny responsibility for payment of those costs. Again, as we note later in this opinion, all the confusion about who should bear the cost of the receiver's expenses is entirely avoided by use of MCR 2.622(D), and we advise courts to consider using this court rule in the future when the appointment of receivers is contemplated.

[44] "As defined by this Court, 'waiver' connotes an intentional abandonment of a known right." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002), citing *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). Conversely, "a 'forfeiture' is the failure to assert a right in a timely fashion." *Roberts*, 466 Mich at 69, citing *Carines*.

merely acquiesced in, the receiver's appointment, and the Court of Appeals erred by holding to the contrary.[45]

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[45] Our waiver jurisprudence generally does not recognize mere acquiescence as a means to waive a known right. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 365; 666 NW2d 251 (2003) (holding that "[m]ere knowing silence generally cannot constitute waiver"). Even Justice CAVANAGH's creative interpretation of *Bailey* and *Fisk* does not support this proposition. Justice CAVANAGH interprets *Bailey* as supporting his assertion that "waiver may also occur by way of acquiescence." *Post* at 234. However, that "[t]he mortgagees dealt with the receiver promptly and in an effort to save loss to themselves by keeping the hotel a going concern, and receivership was used in an attempt to effect sale of the property" and that the mortgagees "availed themselves of any possible advantage of the receivership" was not the Court's pronouncement that acquiescence is sufficient to constitute waiver, but simply a corollary of the Court's recognition that the "bill [of receivership costs] was filed *by consent*." *Bailey*, 262 Mich at 219 (emphasis added). Justice CAVANAGH's reliance on *Bailey* for his acquiescence argument is unsustainable. Justice CAVANAGH's similar interpretation of *Fisk* is likewise unsustainable for reasons we explain later in this opinion.

Moreover, the additional caselaw cited by Justice CAVANAGH in support of his contention that this Court has recognized waiver based on acquiescence is distinguishable from the present matter. See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 219, 223; 737 NW2d 670 (2007) (holding that a party is not precluded from enforcing a deed restriction despite the party's failure to contest a prior violation as long as the prior violation was of a "less serious character" than the subsequent one when a contrary rule would "create increasing chaos in the enforcement of deed restrictions"); *Sampeer v Boschma*, 369 Mich 261, 263, 266; 119 NW2d 607 (1963) (holding that the defendants had waived strict compliance with a procedural rule requiring the court to file and serve on both parties a pretrial statement when defense counsel had knowledge of the procedural irregularity and to which no objection was made at the time); and *Smith v First United Presbyterian Church*, 333 Mich 1, 11; 52 NW2d 568 (1952) (holding that by "vigilant[ly]" maintaining the single-residential character of subdivision property in accordance with the general subdivision plan, the purchaser "acquiesced in the general plan . . . and waived any right she or her grantees would have to act outside of it"). Those same policy concerns, factual circumstances, and affirmative conduct by the party deemed to have waived a known right are clearly not at issue in the present matter. These cases, therefore, fail to demonstrate Dart's intentional relinquishment of its statutory right of first priority.

Nor is there any legal authority supporting the Court of Appeals' conclusion that a party merely *benefiting* from a receivership may be liable for the receiver's costs and fees. Neither *Bailey* nor *Fisk* supports that conclusion. In both *Bailey* and *Fisk*, it was the fact that the parties had expressly consented to the receivership that justified the Court's reordering of the priorities and imposition of the receiver's fees, respectively. Further, the Court of Appeals' reliance on *Attica* was misplaced because *Attica* erroneously characterized *Fisk* as unequivocally holding "that the party who benefited from the receivership is responsible for the receivership expenses . . . ."[46] Rather, *Fisk* held that the general rule is that a receiver's fees should be taken from the property in the receivership. In this case, however, in which the property is insufficient to satisfy the mortgagee's superior lien and the receiver's fees, this general rule cannot be applied. Indeed, the mere receipt of a benefit because of the receiver's actions does not justify disregarding MCL 600.3236. Rather, when MCL 600.3236 is applicable, a receiver's expenses will generally not be entitled to first priority; only when the mortgagee has unequivocally waived this statutory right of first priority will the receiver be entitled to prior satisfaction of his or her expenses consistently with the common-law rule. For these reasons, it was improper for the Court of Appeals to rely on *Bailey*, *Fisk*, and *Attica* as its bases for requiring Dart to pay the receiver's costs and fees.[47]

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[46] *Attica*, 264 Mich App at 592.

[47] The receiver also relies on this Court's decision in *In re Petition of Chaffee*, 262 Mich 291; 247 NW 186 (1933), for the proposition that because Dart did not move for leave to proceed independently of the receiver, it was precluded from interfering with the receivership. *Chaffee*, however, is inapplicable because that case involved the validity of a foreclosure sale, not the competing priority of a receiver's lien and a

IV. APPLICATION

Application of the statute to the facts of this case mandates that Dart, as the holder of a first-recorded mortgage, be entitled to satisfaction of its mortgage interest from the proceeds of the foreclosure sale on a first-priority basis. Dart's first-recorded mortgage took effect on August 8, 2003. Dart validly foreclosed on its mortgage, the property was not redeemed within the extended redemption period, and Dart became the legal and equitable titleholder of the real property under the sheriff's deed on August 26, 2009. The receivership lien was *subsequently* created on November 5, 2009, by order of the circuit court. Because a purchaser of a sheriff's deed takes the property with only those liens that existed at the time the mortgage took effect, and there was no receivership lien when Dart's mortgage took effect in 2003, Dart's first-recorded mortgage has a statutory right of priority under MCL 600.3236 over all other subsequent liens. Moreover, because Dart did not explicitly waive its statutory right of priority, the rule articulated in *Bailey* and *Fisk* is inapplicable and the receiver is precluded from recovering the receivership expenses from Dart.

Further, although the receiver's lien in this case could not prejudice Dart's priority interest, we acknowl-

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preexisting mortgage. Further, to the extent the receiver attempts to attack the validity of the foreclosure proceedings, we note that *Chaffee* is plainly distinguishable. In that case, we affirmed a circuit court's decision to void a foreclosure sale when the mortgagee proceeded with foreclosure proceedings without the court's permission. In this case, the receiver indicated before the foreclosure sale that he did not intend to interfere with Dart's foreclosure. Moreover, when the receiver did move to void the foreclosure sale, nearly a year after the sale had taken place, the circuit court merely extended the redemption period. The receiver has not appealed that decision and, therefore, the validity of the foreclosure proceeding is not before this Court.

edge the need for guidance with regard to priority and payment of receivers' liens. Circuit courts appointing receivers should be cognizant of MCR 2.622(D), which permits a circuit court, "on application of the receiver," to set the compensation of the receiver, and to require the party requesting the receivership to bear the costs associated with it. But regardless of whether a circuit court chooses to exercise its discretion under the court rule, the circuit court, at the time it appoints a receiver, should nevertheless make provision for the payment of receivership expenses and should be aware of the order of priority of any competing interests and other relevant collateral issues that could affect a receiver's compensation. This is particularly important in the context of foreclosure by advertisement, when, as in the present case, a receiver's lien may be extinguished by operation of MCL 600.3236. Not only did the circuit court in the instant case fail to consider the effect of MCL 600.3236 on the receiver's lien, it also failed to consider the court rule. By application of MCR 2.622(D), the receiver might nonetheless have received compensation for the expenses incurred in his administration of the receivership despite the order of priorities, potentially avoiding a situation like that here. That is, had the circuit court exercised its discretion under the court rule, Price and Duffy-Price, as the parties requesting the receivership, might have been liable for payment of the receivership expenses out of their own funds and the receiver might not have been deprived of any compensation.[48]

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[48] If, for example, there had been sufficient equity in the property to satisfy both Dart's preexisting mortgage interest and the receiver's costs and fees, the proper order of distribution of the proceeds following the sale of the DeWitt property would have first required satisfaction of Dart's prior recorded mortgage followed by payment of the receiver's costs and fees. Thus, when seeking payment, a receiver looks first to the property itself.

V. CONCLUSION

Because MCL 600.3236 operates to preserve the order of priority following expiration of the applicable redemption period, it necessarily follows that the order of priority for any liens preexisting the mortgage that is the subject of the foreclosure will remain as it did at the time of the mortgage's execution. Because this statutory provision cannot be reconciled with the common-law rule and because the common-law rule has never been applied to a foreclosure by advertisement under MCL 600.3236, we decline to extend the common-law rule in this case and, consequently, the statute controls. We therefore reverse the judgment of the Court of Appeals imposing on Dart the costs of the receivership and remand this case to the circuit court for entry of an order in Dart's favor consistent with this opinion.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's conclusion that a mortgagee only waives its rights to superior priority under MCL 600.3236 if the mortgagee expressly consents to a receivership or the reordering of priorities. Rather, I would hold that a mortgagee may also waive its superior priority rights if the mortgagee acquiesces to and benefits from the receivership.

In support of its conclusion that a receiver may only obtain superior priority in relation to a mortgagee

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Fisk, 333 Mich at 516. If there are insufficient funds because, for example, a creditor with a superior lien is owed more than what the property is worth, then the receiver may petition the court pursuant to MCR 2.622(D) to order the party who sought the appointment of the receiver to compensate the receiver for his or her costs and fees.

"when the mortgagee has unequivocally waived this statutory right of first priority [under MCL 600.3236]," the majority cites *Bailey v Bailey*, 262 Mich 215; 247 NW 160 (1933), and *Fisk v Fisk*, 333 Mich 513; 53 NW2d 356 (1952). *Ante* at 230. However, in my view, *Bailey* and *Fisk* provide that a waiver may also occur by way of acquiescence.[1]

In *Bailey*, a receiver was appointed for a hotel, which was subject to a mortgage. All parties involved sought to have the receiver operate the hotel during the summer of 1931, but the receiver refused unless the mortgagees consented to his borrowing money and obtaining a first lien with priority over the mortgagees. The mortgagees agreed. Subsequently, the real estate market collapsed, but the mortgagees did not seek to foreclose and instead cooperated with the receiver in his efforts to sell the property. No acceptable offers were received, however.

In determining whether the receiver held priority over the mortgagees for his costs, *Bailey* initially focused on the fact that the mortgagees consented to the receiver's superior priority:

> If the mortgagees had kept out of this matter, except perhaps in respect of contest of the receiver's account,

[1] Waiver by acquiescence is well known in a variety of legal situations. See, e.g., *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (stating that an unambiguous deed restriction is enforced as written "unless the restriction . . . has been *waived by acquiescence*") (emphasis added); *Sampeer v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963) ("If the action of the trial court was irregular, the irregularity was *waived by making no objection* until after the verdict was rendered.") (emphasis added; quotation marks and citation omitted); and *Smith v First United Presbyterian Church*, 333 Mich 1, 11; 52 NW2d 568 (1952) (holding that when the purchaser of real property from a subdivider was vigilant in maintaining the property in accordance with the general plan, the purchaser "*acquiesced* in the general plan . . . and *waived* any right she or her grantees would have to act outside of it") (emphasis added).

> there might be force in their contention that they are liable for no part of the administration costs and expenses of the receivership. *But, as stated, the bill was filed by consent*. [*Bailey*, 262 Mich at 219 (emphasis added; citation omitted).]

However, this Court also stated that even if the mortgagees had not given prior, specific consent to the receiver's priority, their conduct would nevertheless have precluded them from seeking to obtain priority over the receiver because "[t]he mortgagees dealt with the receiver promptly and in an effort to save loss to themselves by keeping the hotel a going concern, and receivership was used in an attempt to effect sale of the property." *Id.* Accordingly, because the mortgagees "availed themselves of any possible advantage of the receivership, *they will not be heard to say that the property in the hands of the receiver is not chargeable with the receiver's expense and administration costs*, even though it may result practically in a corresponding loss to them." *Id.* at 219-220 (emphasis added). This was so because "[a]dministration expenses are incurred on the theory that they benefit the parties ultimately entitled to the property." *Id.* at 220. *Bailey* was also careful to limit the scope of its holding, explaining that a court may only allow a receiver's expenses to displace prior liens when the expenses are required to preserve the property and allow the property to become saleable. *Id.* at 221.

Also, in *Fisk* this Court considered a situation in which the parties had agreed to the appointment of receivers over the corporation at issue while the parties settled a dispute regarding who owned the corporation. This Court held that, when the primary purpose of a receivership is to preserve and protect the property involved in a controversy, "it logically follows that he who ultimately establishes his right to the property

thus held is the one who benefits from the property having been protected and preserved." *Fisk*, 333 Mich at 516, citing *Bailey*, 262 Mich 215. *Fisk* also noted that both parties had agreed to the appointment of the receivers and, "by doing so, appellant in effect waived any complaint he might otherwise make regarding the propriety or legality of the appointment and its effect upon the question of who was to bear the receivership expenses." *Fisk*, 333 Mich at 516 (citation omitted).

In my view, *Bailey* and *Fisk* indicate that although consent by the mortgagee is one method by which a receiver may obtain superior priority, acquiescence by a mortgagee is also sufficient to grant a receiver's expenses priority over a preexisting mortgage. *Bailey* and *Fisk* supported this conclusion by reasoning that the receivership is intended to protect and preserve the property held by the receiver and because a mortgagee or an eventual owner of the receivership property benefits from the receiver's expenditures, it is proper to impose those expenses on the party that benefits. See *Bailey*, 262 Mich at 219-220 (stating that because the mortgagees "availed themselves of any possible advantage of the receivership, they will not be heard to say that the property in the hands of the receiver is not chargeable with the receiver's expense and administration costs, even though it may result practically in a corresponding loss to them"). Thus, in my view, the majority incorrectly states that acquiescence by a mortgagee with knowledge of the receivership is insufficient to provide the receiver superior priority. See *ante* at 228 (claiming that this interpretation would require an "extension of the rule articulated in *Bailey* and *Fisk*"), and *ante* at 228 (claiming that this interpretation is "wholly unsupported by our jurisprudence"). Rather, *Bailey* specifically supports this conclusion.

Applying *Bailey* and *Fisk* to this case, I believe that, at a minimum, Dart Bank acquiesced to the receivership. Specifically, Dart never objected to the receiver's actions, despite its knowledge of the receiver's efforts. This Court has long recognized the inherent authority of a court of equity to appoint a receiver under appropriate circumstances, see *McDonald*, 351 Mich at 575-576, and Dart does not argue that the receivership in this case was improper. Moreover, the Court of Appeals has held that entities that are not parties to a receivership order but are nevertheless affected by the receivership order need not be served with notice under MCR 2.105(D), particularly when the affected entity receives actual notice of the order. *In re Contempt of Cornbelt Beef Corp*, 164 Mich App 114, 120; 416 NW2d 696 (1987), citing *Davis v Davis*, 137 Mich App 291, 293; 358 NW2d 6 (1984), and *Tuller v Wayne Circuit Judge*, 243 Mich 239, 243-245; 219 NW 939 (1928). Accordingly, Dart was not entitled to formal notice of the receivership.

Furthermore, although Dart was not a party to the receivership order entered on April 10, 2008, and Dart initiated a foreclosure by advertisement on April 15, 2008—before it was aware of the receivership—Dart admitted that it had received actual notice of the receivership only three days later, on April 18, 2008. Moreover, the majority's notation that " '[m]ere knowing silence generally cannot constitute waiver,' " *ante* at 229 n 45, quoting *Quality Prods & Concepts Co v Nagel Precision Inc*, 469 Mich 362, 365; 666 NW2d 251 (2003), is irrelevant because Dart did not merely stand mute when it learned of the receivership. Rather, in a letter acknowledging the receivership, Dart's attorney stated that it "would be willing to work with [the receiver] . . . in terms of arranging for a sale of the property so that this mortgage can be paid." Also, Dart's subsequent

interaction with the receiver during the year between its acknowledgement of the receivership and the sheriff's sale substantiates Dart's willingness to work with the receiver. Additionally, during the October 14, 2009, hearing in the trial court, Dart's attorney admitted that Dart "acquiesced to the fact that there was a receiver out there . . . ." The trial court, the receiver, and Dart agreed that the property was in terrible condition and, although the expenses of repairing it were high, they were necessary in this case. Furthermore, the receiver provided reports documenting his expenditures related to repairing the property in hopes of returning it to a saleable condition, and Dart never acted to formally challenge any specific expenditure by the receiver related to the property's repair. Thus, in my view, Dart's conduct was sufficient to establish that Dart had knowledge of and acquiesced to the receivership. Accordingly, in my view, Dart clearly engaged in "affirmative conduct" that was sufficient to show that Dart "waived a known right," *ante* at 229 n 45, just as did the parties in *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007); *Sampeer v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963); and *Smith v First United Presbyterian Church*, 333 Mich 1, 11; 52 NW2d 568 (1952).

Additionally, as mortgagee, Dart benefited from the receiver's efforts to repair, preserve, and protect the property because the repairs increased the property's value. Therefore, the receiver's efforts improved Dart's chances of recovering the full amount of its mortgage when the receiver sold the property. The fact that the receiver was not able to sell the property at a suitable price does not undercut this analysis because *Bailey* held that the receiver's costs take priority "even though it may result practically in a corresponding loss to [the mortgagee]." *Bailey*, 262 Mich at 219-220. Accordingly,

as stated in *Bailey*, Dart should not "be heard to say that the property in the hands of the receiver is not chargeable with the receiver's expense" when the mortgagee "availed [itself] of any possible advantage of the receivership . . . ." *Id.* at 219.[2]

Finally, as the ultimate owner of the property through the foreclosure process, Dart also benefited from the receiver's efforts to repair, preserve, and protect the property. This aspect of the case falls under *Fisk*'s conclusion that when the primary purpose of a receivership is to preserve and protect the property involved in a controversy, "it logically follows that he who ultimately establishes his right to the property thus held is the one who benefits from the property

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[2] *Bailey*'s discussion of the importance of who receives the benefit of a receiver's efforts is consistent with this Court's discussion of the issue in other opinions. For example, in *Holmes v Holmes*, 265 Mich 16, 18; 251 NW 360 (1933), this Court stated that imposing responsibility for the receiver's expenses on the receivership property is appropriate when the receiver "performed valuable services" that "were beneficial" and the parties had consented to the receiver's appointment. Likewise, in *Fisk*, this Court stated that

> "[r]eceivers ordinarily have a right to compensation for their services and expenses, and such right is a strong equity, analogous to an obligation founded upon an implied contract, and is not dependent upon the mere arbitrary discretion of the court, if the appointment of the receiver was regular and his conduct has been free from exception. Such right of the receiver to compensation is a charge on the property or fund in receivership." [*Fisk*, 333 Mich at 518 (citation omitted).]

See, also, *Cohen v Cohen*, 125 Mich App 206, 215; 335 NW2d 661 (1983) (upholding a receiver's fees because the fees were not "excessive" and were "reasonable in light of the actions the receiver was required to take in order to protect the property"), and 65 Am Jur 2d, Receivers, § 220, p 777 ("The general rule is that the compensation of a receiver, where the receivership proceedings are not sought by a mortgagee, is subordinate to the lien of the mortgage, at least *where the mortgagee receives no benefit therefrom*.") (emphasis added).

having been protected and preserved." *Fisk*, 333 Mich at 516. Accordingly, because Dart, as the eventual owner of the property, benefited from the receiver's efforts to repair, preserve, and protect the property in that Dart received a habitable, sellable property, I would require Dart to bear the cost of that benefit.

Thus, I would affirm the judgment of the Court of Appeals because, in my view, Dart waived its statutory right to superior priority under MCL 600.3236 because it had knowledge of the receivership, acquiesced to the receivership, and benefited from the receiver's efforts to repair, preserve, and protect the property.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

DOUGLAS v ALLSTATE INSURANCE COMPANY

Docket No. 143503. Argued April 4, 2012 (Calendar No. 1). Decided July 30, 2012.

James Douglas filed an action in the Washtenaw Circuit Court against Allstate Insurance Company, seeking to recover personal protection insurance (PIP) benefits under the no-fault automobile insurance act, MCL 500.3101 *et seq*. In 1996, plaintiff sustained a severe closed-head brain injury when a hit-and-run motorist struck the bicycle he was riding. The driver of the vehicle could not be identified. The Michigan Assigned Claims Facility assigned defendant to plaintiff's no-fault insurance claim. Defendant paid plaintiff PIP benefits for the first three years after the accident. Plaintiff brought this suit in 2005, seeking additional PIP benefits. Defendant filed three separate summary disposition motions. With the consent of the parties, the court, Donald E. Shelton, J., granted the first motion for partial summary disposition under MCL 500.3145(1), barring any portion of plaintiff's claim that had accrued more than one year before plaintiff commenced the suit on May 31, 2005, but denied the other two motions. Following a bench trial, the court determined that plaintiff needed attendant care and awarded PIP benefits to plaintiff for attendant-care services. The court determined that plaintiff's wife, Katherine Douglas, had been providing those services. The court calculated that plaintiff was entitled to 67 hours a week of attendant care for the period between May 31, 2004, and November 1, 2007, and 40 hours a week after November 1, 2007. The court set the hourly rate for those services at $40. Defendant appealed. In an unpublished opinion per curiam, issued June 23, 2011 (Docket No. 295484), the Court of Appeals, MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ., affirmed the circuit court's decision denying defendant's final two summary disposition motions, but reversed the award of benefits because the record failed to reflect that Katherine had maintained adequate records of the care that she had provided. The Court of Appeals remanded the case to the circuit court for further proceedings regarding the amount of expenses incurred for attendant care and to determine whether Katherine had expected compensation at the time she performed the services. The Court of Appeals also affirmed the circuit court's establishment of a $40

hourly rate for the attendant-care services provided by Katherine. The Supreme Court granted defendant leave to appeal. 490 Mich 927 (2011).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

An injured person who seeks reimbursement for attendant-care services must prove by a preponderance of the evidence not only the amount and nature of the services rendered, but also the caregiver's expectation of compensation or reimbursement for providing the care. If the fact-finder concludes that the plaintiff incurred allowable expenses in receiving care from a family member, the fact-finder must determine to what extent any claimed expense is a reasonable charge.

1. MCL 500.3107(1)(a) imposes four requirements that a PIP claimant must prove in order to recover benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable. Thus, the fact-finder must examine whether attendant-care services were necessitated by the injury sustained in the motor vehicle accident before compensating an injured person for the services. Charges for ordinary household tasks that are not for the injured person's care are not allowable expenses.

2. MCL 500.3145(1) bars the recovery of benefits for otherwise allowable expenses incurred more than one year before the filing of the lawsuit. Accordingly, plaintiff could not recover benefits for allowable expenses incurred before May 31, 2004.

3. Expenses for recovery or rehabilitation are costs expended in order to bring an insured to a condition of health or ability sufficient to resume his or her preinjury life. Expenses for care need not restore a person to his or her preinjury state, but must be related to the insured's injuries to be considered allowable expenses. Allowable expenses cannot be for ordinary and necessary services, also known as replacement services, because ordinary and necessary services are not for an injured person's care, recovery, or rehabilitation. Although many of the services that Katherine claimed that she had performed were properly considered replacement services, including daily organization of the family life; preparation of family meals; yard, house, and car maintenance; and daily chores, she also claimed that she had performed services that could reasonably be considered attendant-care services, including traveling to and communicating with plaintiff's medical providers; managing plaintiff's medication; and supervising plaintiff to ensure that he was cared for and did not

harm himself—even though she also performed other tasks while supervising plaintiff. The Court of Appeals correctly rejected defendant's argument that Katherine only provided replacement services given that there was testimony at trial indicating that at least some of the services that she said she had provided were for plaintiff's care as necessitated by the injury he sustained in the motor vehicle accident.

4. Under MCL 500.3107(1)(a), whether claimed expenses were reasonably necessary must be assessed using an objective standard. It was not clear error for the circuit court to conclude that attendant-care services were reasonably necessary for the period before November 7, 2006, a time during which the affidavit of plaintiff's treating psychologist stated that plaintiff needed attendant care during all waking hours. The psychologist testified at trial that as early as 1997, plaintiff's doctors had recommended that plaintiff receive 24-hour supervision, and defendant's claims adjuster agreed with plaintiff's counsel that that if plaintiff required attendant-care services at the time of trial, he would have needed those services when the lawsuit began. This evidence was sufficient for the circuit court to conclude that because attendant-care services were necessary after November 7, 2006, they were also reasonably necessary before that date.

5. MCL 500.3107(1)(a) limits allowable expenses to charges incurred. Even if a claimant can show that services were for his or her care and were reasonably necessary, the insurer is not obliged to pay any amount except upon submission of evidence demonstrating that services were actually rendered and the actual cost expended. Because a charge is something required or demanded, the caregiver must have an expectation that he or she be compensated. The best way of proving that a caregiver expected compensation at the time the services were rendered is for the caregiver to document the incurred charges contemporaneously with providing them—whether in a formal bill or in another memorialized statement that logs with specificity the nature and amount of services rendered—and submit that documentation to the insurer within a reasonable amount of time after the services were rendered. The evidentiary requirement to prove that charges were incurred applies equally when a family member provides care and when an unrelated medical professional provides care. In this case, the circuit court awarded benefits without making a finding regarding whether the charges were actually incurred, including whether Katherine actually expected payment for providing the services. The Court of Appeals properly recognized that the award of benefits could not be sustained and appropriately remanded this

case for findings of fact based on the evidence. However, the Court of Appeals erred by limiting the period to be considered on remand. The circuit court must make the required findings of fact as they pertain to the entire period of the lawsuit.

6. Once a fact-finder has concluded that a plaintiff incurred allowable expenses in receiving care from a family member, the fact-finder must determine whether the charge was reasonable. A fact-finder may base the compensation for a family member's provision of attendant-care services on what health-care agencies compensate their employees, but what health-care agencies charge their patients is too attenuated from the appropriate hourly rate for a family member's services to be controlling. Rather, the fact-finder must determine what is a reasonable charge for an individual's provision of services, including consideration of the compensation provided to individual caregivers for their services. In this case, the circuit court awarded attendant-care benefits to plaintiff at the rate of $40 an hour. While trial testimony indicated that a company owned by plaintiff's treating psychologist charged $40 an hour for attendant care, the circuit court's finding was clearly erroneous given that Katherine was paid $10 an hour by the treating psychologist's company to provide attendant-care services for her husband. If the circuit court concludes on remand that plaintiff has proved his entitlement to benefits for Katherine's services, it must establish a new hourly rate on the basis of an individual caregiver's hourly rate.

7. Recovery of benefits for replacement services is limited to those services provided in the first three years after the accident under MCL 500.3107(1)(c). Accordingly, plaintiff could not recover any benefits for replacement services.

Affirmed in part; reversed in part; award of attendant-care benefits vacated, and case remanded to the circuit court for further proceedings.

Justice CAVANAGH, joined by Justices MARILYN KELLY and HATHAWAY, dissenting, rejected the majority's interpretation of the phrase "charges incurred" in MCL 500.3107(1)(a) and also rejected the majority's emphasis on an individual caregiver's hourly rate when determining whether a charge is reasonable under the statute. The majority's conclusion that for charges to have been incurred the insured must establish that the caregiver expected compensation for the services rendered and that the expectation of payment arose at the time the caregiver provided the services is not supported by the statutory language. The insurer incurs the charge by way of its statutory obligation to provide PIP benefits under MCL 500.3107(1)(a)

when the insured proves that the services were reasonably necessary and actually rendered and that the amount of the charge is reasonable. The caregiver's expectation of payment is irrelevant. The majority's requirement that the caregiver expect compensation at the time the services were rendered also punishes family members who act to provide care for a loved one without a contemporaneous expectation of compensation. Imposing burdensome preferences for specific documentary evidence on insureds is also statutorily unsupported and improperly invades the role of the fact-finder. Agency rates are relevant to determining the proper rate of compensation for PIP benefits. The circuit court did not clearly err by awarding plaintiff PIP benefits at the rate of $40 an hour.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — REQUIREMENTS.

Under the no-fault automobile insurance act, a claimant seeking to recover personal protection insurance benefits for allowable expenses must prove four things: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable (MCL 500.3107[1][a]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — CARE, RECOVERY, OR REHABILITATION.

A no-fault insurer is liable under the personal protection insurance provisions of the no-fault automobile insurance act for allowable expenses consisting of all reasonable charges incurred for products, services, and accommodations reasonably necessary for an injured person's care, recovery, or rehabilitation; expenses for recovery or rehabilitation are costs expended in order to bring an insured to a condition of health or ability sufficient to resume his or her preinjury life; expenses for care need not restore a person to his or her preinjury state, but must be related to the insured's injuries; allowable expenses cannot be for ordinary and necessary services (MCL 500.3107[1]).

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — CHARGES INCURRED — CAREGIVER'S EXPECTATION OF PAYMENT.

Under the personal protection insurance provisions of the no-fault automobile insurance act, an insurer is liable for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation, but the insurer is not obligated to pay any amount except upon submis-

sion of evidence that services were actually rendered and of the actual cost expended; the caregiver must have expected that he or she would be compensated in order for the charges to be considered incurred; the best way of proving that a caregiver expected compensation is for the caregiver to document the incurred charges contemporaneously with providing them—whether in a formal bill or in another memorialized statement that logs with specificity the nature and amount of services rendered—and submit that documentation to the insurer within a reasonable amount of time after the services were rendered; the evidentiary requirement applies equally when a family member provides care and when an unrelated medical professional provides care (MCL 500.3107[1][a]).

4. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — CHARGES INCURRED — REASONABLE CHARGES — ATTENDANT-CARE SERVICES — CARE BY FAMILY MEMBERS.

Under the no-fault automobile insurance act, a claimant seeking to recover personal protection insurance benefits for allowable expenses must prove that any charges incurred were reasonable; in determining what is a reasonable charge for a family member's provision of attendant-care services, the fact-finder may base the family member's hourly rate on the amount health-care agencies compensate their employees, but the amount health-care agencies charge their patients is not controlling; rather, the fact-finder must determine what is a reasonable charge for an individual's provision of services, not an agency's (MCL 500.3107[1][a]).

Bredell & Bredell (by *John H. Bredell*) for plaintiff.

Potter, DeAgostino, O'Dea & Patterson (by *P. Kelly O'Dea*) for defendant.

Amici Curiae:

Miller Johnson (by *Richard E. Hillary, II*, and *Stephen R. Ryan*) for the Coalition Protecting Auto No-Fault.

Gross & Nemeth, P.L.C. (by *Mary T. Nemeth*), for the Insurance Institute of Michigan.

YOUNG, C.J. Under the terms of the no-fault act,[1] a person injured in a motor vehicle accident is entitled to recover personal protection insurance (PIP) benefits for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."[2] This case requires this Court to consider whether the services provided by plaintiff's wife constituted services "for an injured person's care," whether the Court of Appeals properly remanded this case to the circuit court for findings of fact regarding the extent to which expenses for services for plaintiff's care were actually incurred, and whether the circuit court erred by awarding an hourly rate that corporate agencies charge for rendering services, rather than an hourly rate that individual caregivers receive for those services.

We hold that "allowable expenses" must be "*for* an injured person's care, recovery, or rehabilitation."[3] Accordingly, a fact-finder must examine whether attendant care services are "necessitated by the injury sustained in the motor vehicle accident" before compensating an injured person for them.[4] However, the services cannot simply be " '[o]rdinary household tasks,' " which are not *for* the injured person's care.[5] Moreover, because an allowable expense consists of a "charge[]"[6] that " 'must be incurred,' "[7] an injured

[1] MCL 500.3101 *et seq*.

[2] MCL 500.3107(1)(a).

[3] *Id*. (emphasis added).

[4] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 535; 697 NW2d 895 (2005).

[5] *Visconti v DAIIE*, 90 Mich App 477, 481; 282 NW2d 360 (1979), quoting *Kushay v Sexton Dairy Co*, 394 Mich 69, 74; 228 NW2d 205 (1975).

[6] MCL 500.3107(1)(a).

[7] *Griffith*, 472 Mich at 532 n 8, quoting *Manley v DAIIE*, 425 Mich 140, 169; 388 NW2d 216 (1986) (BOYLE, J., concurring in part).

person who seeks reimbursement for any attendant care services must prove by a preponderance of the evidence not only the amount and nature of the services rendered, but also the caregiver's expectation of compensation or reimbursement for providing the attendant care. Because the no-fault act does not create different standards depending on who provides the services, this requirement applies equally to services that a family member provides and services that an unrelated caregiver provides.

If the fact-finder concludes that a plaintiff incurred allowable expenses in receiving care from a family member, the fact-finder must also determine to what extent any claimed expense is a "reasonable charge[]."[8] While it is appropriate for the fact-finder to consider hourly rates charged by individual caregivers when selling their services (whether to their employers that commercially provide those services or directly to injured persons), comparison of hourly rates charged by commercial caregiving agencies is far too attenuated from an individual's charge for the fact-finder simply to adopt that agency charge as an individual's reasonable charge.

In applying these principles of law to the facts of this case, we hold that the Court of Appeals correctly determined that plaintiff may recover "allowable expenses" to the extent that they encompass services that are reasonably necessary for plaintiff's care when the care is "related to [plaintiff's] injuries."[9] However, because the circuit court erred by awarding damages for allowable expenses without requiring proof that the underlying charges were actually incurred, we agree with the decision of the Court of Appeals to

[8] MCL 500.3107(1)(a).

[9] *Griffith*, 472 Mich at 534.

remand this case to the circuit court for a determination whether charges for allowable expenses were actually incurred. Nevertheless, we also conclude that the Court of Appeals erred to the extent that its decision limited the scope of the determination on remand to the period after November 7, 2006. Instead, the circuit court must reexamine on remand the evidentiary proofs supporting the entire award. While we reject defendant's request for a verdict of no cause of action because there remain unresolved questions of fact, we caution the circuit court that a fact-finder can only award benefits that are proved to have been incurred. Finally, in determining the hourly rate for attendant care services, the circuit court clearly erred by ruling that plaintiff is entitled to an hourly rate of $40 for attendant care services because that rate is entirely inconsistent with the evidence of an individual's rate of compensation, including the compensation that Katherine Douglas, plaintiff's wife, actually received as an employee hired to care for plaintiff. We reverse the judgment of the Court of Appeals on this issue. Therefore, we affirm in part, reverse in part, vacate the award of attendant care benefits, and remand this case to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 1996, plaintiff, James Douglas, sustained a severe closed-head brain injury when a hit-and-run motorist struck the bicycle he was riding. Plaintiff was hospitalized for approximately one month after the accident and received therapy and rehabilitation after his discharge. Because the driver of the motor vehicle that struck plaintiff could not be identified, plaintiff sought

assignment of a first-party insurance provider through the Michigan Assigned Claims Facility.[10] The facility assigned defendant, Allstate Insurance Company, to plaintiff's claim. In the three years after the accident, defendant paid plaintiff PIP benefits for his hospitalization, medical expenses, wage loss, and attendant care, as well as for replacement services, in accordance with the no-fault act. Defendant claims that plaintiff did not seek additional PIP benefits after 1999 until he filed the instant lawsuit in 2005.

In 1999, plaintiff began the first of a series of full-time jobs. However, he was unable to hold a job for very long, and he eventually stopped working. During this time, he twice attempted suicide. After the second suicide attempt, a 2005 letter written by plaintiff's psychiatrist indicated that plaintiff "requires further treatment" because he "continues to suffer from ill-effects as a result of his closed-head injury . . . ." In particular, the psychiatrist emphasized that plaintiff suffered from short-term memory problems and impulsivity as a result of the accident and explained that plaintiff "should have the opportunity to obtain the care that will most likely restore him to a good level of functioning." Defendant claims that it did not receive this letter before plaintiff initiated this lawsuit.

Plaintiff filed the instant lawsuit on May 31, 2005, in the Washtenaw Circuit Court seeking compensation for

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[10] MCL 500.3172(1) provides that

> [a] person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury, [or] no personal protection insurance applicable to the injury can be identified . . . .

unspecified PIP benefits that defendant "has refused or is expected to refuse to pay . . . ."[11] Defendant filed three successive dispositive motions, only the first of which was granted.[12] Relevant here, the second motion for summary disposition claimed that attendant care was not reasonably necessary because none of plaintiff's medical providers had prescribed attendant care for plaintiff. The circuit court denied the motion without prejudice in advance of further discovery. The third motion for partial summary disposition claimed that plaintiff could not recover for attendant care services provided before November 7, 2006, because plaintiff's treating psychologist, Dr. Thomas Rosenbaum, neither authorized nor prescribed attendant care services before that date. In opposing the motion, plaintiff offered an affidavit from Dr. Rosenbaum, which stated that plaintiff "is in need of aide care during all waking hours" and that Katherine Douglas "has been providing her husband with aide care, while the two of them are together, since the motor vehicle accident." After hearing oral argument, the circuit court denied defendant's third motion, ruling that Dr. Rosenbaum's affidavit created a question of fact that precluded partial summary disposition.

The parties proceeded to a bench trial on the claim for attendant care services that Mrs. Douglas allegedly provided. Defendant's claims adjuster testified during

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[11] Because defendant paid PIP benefits for medical bills during the pendency of the suit, the only potential PIP benefits at issue were the services that plaintiff's wife provided.

[12] The first motion for partial summary disposition claimed that MCL 500.3145(1) barred any portion of plaintiff's claim that accrued more than one year before plaintiff commenced the suit, that is, before May 31, 2004. The circuit court granted defendant's motion for partial summary disposition with the consent of the parties. See MCL 500.3145(1), which states, in relevant part, that a claimant "may not recover [PIP] benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

plaintiff's case-in-chief as an adverse witness. This witness agreed with plaintiff's counsel that plaintiff "would have needed [attendant care] back when the lawsuit first began" in 2005 and that "it would be appropriate to pay Mrs. Douglas for some of [the] care that she provides . . . at home[.]" However, on direct examination by defendant's counsel, the claims adjuster testified that there was no evidence that any compensable care had actually been provided to plaintiff.

Katherine Douglas testified that when she was at home, her entire time was spent "babysitting" and "watching James," even while she was performing other household chores. She believed that her presence in the house kept plaintiff from being hospitalized or incarcerated. She also testified about a series of forms, each labeled "AFFIDAVIT OF ATTENDANT CARE SERVICES," all dated June 25, 2007, covering each month between November 2004 and June 2007. These forms totaled up the number of hours during which she claimed to have provided services and outlined the various tasks that she performed, including organizing her family's day-to-day life, cooking meals, undertaking daily chores, maintaining the family's house and yard, ordering and monitoring plaintiff's medications, communicating with health care providers and Social Security Administration officials, calling plaintiff from work to ensure plaintiff's safety, monitoring plaintiff's safety, and cueing or prompting various tasks for plaintiff to undertake. However, she admitted that the forms were all completed in June 2007, that she did not contemporaneously itemize the amount of time she spent on any particular item, and that in completing the forms, she went through household bills to reconstruct what had occurred in her life during the relevant period.

Dr. Rosenbaum testified that he began treating plaintiff on November 7, 2006, and recommended that Mrs. Douglas provide attendant care for all of plaintiff's waking hours,[13] although in November 2007 he revised his recommendation to 40 hours of attendant care a week. Dr. Rosenbaum also testified that *his* company, TheraSupport, L.L.C., served as plaintiff's attendant care provider and that TheraSupport had employed Mrs. Douglas to provide her husband's attendant care. Although TheraSupport paid Mrs. Douglas $10 an hour for providing services to plaintiff, it billed plaintiff $40 an hour for those very services. Dr. Rosenbaum averred that defendant eventually paid all of TheraSupport's bills.

Defendant's medical expert, Dr. Charles Seigerman, testified that he conducted a battery of cognitive tests on plaintiff and concluded that two hours of attendant care services a day are needed to help plaintiff organize the logistics of his treatment and ensure that he takes his medicine. Dr. Seigerman also testified that an appropriate hourly rate for these services was "around $10.00 an hour," or "[p]erhaps a little higher," although he acknowledged on cross-examination that he was not an expert on the appropriate rate of compensation for this service.

The circuit court awarded PIP benefits to plaintiff, explaining that he "needs aide care for all of his waking hours." The circuit court calculated that plaintiff was entitled to a total of 67 hours a week of attendant care for the period between May 31, 2004, and November 1, 2007, and 40 hours a week after November 1, 2007.[14]

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[13] Dr. Rosenbaum also noted that another of plaintiff's medical providers had recommended in 1997 that plaintiff receive 24-hour supervisory care.

[14] The 67-hour week corresponded to 7 hours each weekday and 32 hours during the weekend (16 hours each on Saturday and Sunday), while the 40-hour week corresponded to Dr. Rosenbaum's subsequent recommendation.

The court established a $40 hourly rate for those services. The judgment entered on November 18, 2009, and totaled $1,163,395.40, which included attorney fees, no-fault interest, costs, and judgment interest.

The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. First, the panel rejected defendant's claim that the circuit court had erred by denying its final two motions for summary disposition. In particular, the panel concluded that Dr. Rosenbaum's affidavit created a question of fact regarding whether attendant care services were "reasonably necessary" for the period before Dr. Rosenbaum began treating plaintiff on November 7, 2006.[15] The panel also rejected defendant's claim that the circuit court had erred by awarding plaintiff benefits for replacement services because the award "was not intended to compensate Katherine for her mere presence in the home," but instead was intended to compensate for "plaintiff[']s] required supervision," and "Katherine was the appropriate person to provide it."[16]

The Court of Appeals reversed the circuit court's award, however, because "the trial evidence in this case did not reflect that Katherine maintained records of her claimed attendant care."[17] Although Mrs. Douglas had submitted several forms, each labeled "AFFIDAVIT OF ATTENDANT CARE SERVICES," the panel concluded that when the descriptions on the forms had not been "left blank," they were "vague" and only constituted "an effort to reconstruct her time."[18] Thus, the panel remanded for further proceedings "regarding the

[15] MCL 500.3107(1)(a).

[16] *Douglas v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2011 (Docket No. 295484), p 5.

[17] *Id.* at 6.

[18] *Id.* at 6-7.

amount of incurred expenses for attendant care from November 7, 2006, to November 18, 2009," and to determine "whether Katherine reasonably expected compensation at the time of performance."[19] Finally, the panel upheld the circuit court's $40 hourly rate because that rate "is supported by Rosenbaum's testimony regarding the rate charged by his TheraSupport program for attendant care and also the testimony of defendant's adjuster regarding rates charged by commercial agencies for home attendant care."[20]

This Court granted defendant's application for leave to appeal and ordered the parties to brief the following issues:

> (1) whether the Court of Appeals erred in remanding this case to the trial court for further proceedings regarding the amount of incurred expenses for attendant care from November 7, 2006, to November 18, 2009, after finding that the trial court clearly erred in awarding attendant care benefits to the plaintiff without requiring sufficient documentation to support the daily and weekly hours underlying the award; (2) whether the plaintiff presented sufficient proofs at trial to support the trial court's award of attendant care benefits for the period before November 7, 2006; (3) whether activities performed by Katherine Douglas constituted attendant care under MCL 500.3107(1)(a) or replacement services under MCL 500.3107(1)(c); and (4) whether the trial court clearly erred in awarding attendant care benefits at the rate of $40 per hour.[21]

II. STANDARD OF REVIEW

This case involves the interpretation of the no-fault act. "Issues of statutory interpretation are questions of

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[19] *Id.* at 7.

[20] *Id.*

[21] *Douglas v Allstate Ins Co*, 490 Mich 927 (2011).

law that this Court reviews de novo."[22] When interpreting a statute, we must "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute."[23] This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[24] If the statutory language is unambiguous, "the Legislature's intent is clear and judicial construction is neither necessary nor permitted."[25]

We review de novo the denial of a motion for summary disposition.[26] A motion for summary disposition under MCR 2.116(C)(10) requires the reviewing court to consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[27]

In civil actions tried without a jury, MCR 2.517(A)(1) requires the court to "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." We review these findings of fact for clear error,[28] which occurs when " 'the reviewing court is left with a definite and firm conviction that a

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[22] *Griffith*, 472 Mich at 525-526.

[23] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[24] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[25] *Griffith*, 472 Mich at 526, citing *Koontz*, 466 Mich at 312.

[26] *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

[27] *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

[28] MCR 2.613(C); *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001).

mistake has been made.' "[29]

III. ANALYSIS

A. LEGAL BACKGROUND OF THE NO-FAULT ACT

MCL 500.3105(1) establishes that a personal protection insurance provider is liable under the no-fault act "to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." Accordingly, MCL 500.3105(1) imposes two threshold causation requirements for PIP benefits:

> First, an insurer is liable only if benefits are "*for* accidental bodily injury . . . ." "[F]or" implies a causal connection. "[A]ccidental bodily injury" therefore triggers an insurer's liability and defines the scope of that liability. Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.
>
> Second, an insurer is liable to pay benefits for accidental bodily injury only if those injuries "aris[e] out of" or are caused by "the ownership, operation, maintenance or use of a motor vehicle . . . ." It is not *any* bodily injury that triggers an insurer's liability under the no-fault act. Rather, it is only those injuries that are caused by the insured's use of a motor vehicle.[30]

MCL 500.3107(1) further limits what benefits are compensable as PIP benefits, allowing unlimited lifetime benefits for "allowable expenses" but limiting "ordinary and necessary services" to a three-year period after the accident and to a $20 daily limit:

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[29] *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008), quoting *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

[30] *Griffith*, 472 Mich at 531 (alterations in original).

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . .
>
> * * *
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

This Court's decision in *Johnson v Recca* clarified that the "ordinary and necessary services" contemplated in subsection (1)(c)—commonly referred to as "replacement services"—constitute a category of expenses distinct from the "allowable expenses" contemplated in subsection (1)(a).[31]

This case requires this Court to consider whether the specific services at issue here were "allowable expenses"[32] or whether they were replacement services.[33] The distinction between allowable expenses and replacement services is important in this case because the operation of the one-year-back rule, MCL 500.3145(1), prevents plaintiff from recovering benefits for otherwise allowable expenses incurred more than one year before the filing of the lawsuit. Thus, plaintiff cannot recover benefits for otherwise allowable expenses incurred before May 31, 2004, which was nearly eight

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[31] *Johnson v Recca*, 492 Mich 169, 176; 821 NW2d 520 (2012).

[32] MCL 500.3107(1)(a).

[33] MCL 500.3107(1)(c).

years after plaintiff's July 1996 accident. Because recovery for replacement services is limited to those services provided in the first three years after the accident, plaintiff cannot recover any benefits for replacement services. Accordingly, in this case, plaintiff can only recover benefits for services to the extent that the services were allowable expenses within the meaning of MCL 500.3107(1)(a) and incurred after May 31, 2004. It is to the definition of "allowable expenses" that we now turn.

B. ALLOWABLE EXPENSES

MCL 500.3107(1)(a) defines "allowable expenses" as "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." We have recognized that the plain language of this provision imposes four requirements that a PIP claimant must prove before recovering benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable.[34] We will address these requirements seriatim as we apply them to the facts of this case.

1. SERVICES "FOR" AN INSURED'S CARE, RECOVERY, OR REHABILITATION

MCL 500.3107(1)(a) requires that allowable expenses must be "for an injured person's care, recovery, or rehabilitation." As we explained in *Griffith v State Farm Mutual Automobile Insurance Co*, "expenses for 'recovery' or 'rehabilitation' are costs expended in order

[34] See *Griffith*, 472 Mich at 532 n 8.

to bring an insured to a condition of health or ability sufficient to resume his preinjury life," while expenses for "care" "may not restore a person to his preinjury state."[35] While the dictionary definition of "care" "can be broadly construed to encompass *anything* that is reasonably necessary to the provision of a person's protection or charge,"[36] because MCL 500.3107(1)(a) "specifically limits compensation to charges for products or services that are reasonably necessary for an *injured person's* care, recovery, or rehabilitation[,] . . . [t]his context suggests that 'care' must be related to the insured's injuries."[37] In comparing the definition of "care" to the definitions of "recovery" and "rehabilitation," we concluded that

> "[c]are" must have a meaning that is broader than "recovery" and "rehabilitation" but is not so broad as to render those terms nugatory. . . . "[R]ecovery" and "rehabilitation" refer to an underlying injury; likewise, the statute as a whole applies only to "an injured person." It follows that the Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident. "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state.[38]

We reaffirm here *Griffith*'s definition of "care" as it relates to the scope of allowable expenses: although services for an insured's care need not restore a person to his preinjury state, the services must be related to the insured's injuries to be considered allowable expenses.

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[35] *Id.* at 535.

[36] *Id.* at 533.

[37] *Id.* at 534 (quotation marks omitted).

[38] *Id.* at 535.

In analyzing this requirement as applied to the particular services claimed in this case, we note that prior panels of the Court of Appeals examined the extent to which a family member's services can be considered allowable expenses under the no-fault act. In *Visconti v Detroit Automobile Inter-Insurance Exchange*, the panel analogized no-fault benefits to worker's compensation benefits and ruled that " '[o]rdinary household tasks' " that a family member performs are not allowable expenses, but " '[s]erving meals in bed and bathing, dressing, and escorting a disabled person are not ordinary household tasks' "[39] and can therefore be considered allowable expenses pursuant to MCL 500.3107.

A subsequent Court of Appeals panel applied *Visconti* and allowed the plaintiff to recover no-fault benefits when a family member was "required to serve his meals in bed, bathe him, escort him to the doctor's office, exercise him in conformity with his doctor's instructions, assist in formulating his diet, administer medication, and assist him with speech and associational therapy."[40] The Court also held that, even though the family member who provided these services was not a licensed medical care provider, "[t]he statute does not require that these services be supplied by 'trained medical personnel'."[41] In other words, while the no-fault act specifies and limits what types of expenses are compensable, it places no limitation on *who* may perform what is otherwise an allowable expense.

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[39] *Visconti*, 90 Mich App at 481, quoting *Kushay*, 394 Mich at 74.

[40] *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 180; 318 NW2d 679 (1982).

[41] *Id.*

The statutory language of MCL 500.3107 confirms the distinction between a family member providing attendant care to an injured person—which is "for an injured person's care"[42]—and a family member providing replacement services to benefit the entire household—which are "ordinary and necessary services" that replace services that the injured person would have performed "for the benefit of himself or herself or of his or her dependent."[43] Accordingly, we reiterate this Court's recent holding in *Johnson* that replacement services as described in MCL 500.3107(1)(c) are distinct from allowable expenses under MCL 500.3107(1)(a).[44] Allowable expenses cannot be for "ordinary and necessary services" because ordinary and necessary services are not "for an injured person's care, recovery, or rehabilitation."

In this case, defendant claims that a judgment of no cause of action should be entered because Mrs. Douglas did not perform any compensable allowable expenses, only replacement services, which are not compensable in this case because of the three-year time limit of MCL 500.3107(1)(c). We disagree with defendant's claim and conclude that defendant is not entitled to relief on this issue.

Defendant is correct that Mrs. Douglas's testimony and attendant care forms indicate that she provided many services that are properly considered replacement services, including daily organization of family life; preparation of family meals; yard, house, and car maintenance; and daily chores. These services are prototypical "ordinary and necessary" services that every Michi-

[42] MCL 500.3107(1)(a).

[43] MCL 500.3107(1)(c).

[44] *Johnson*, 492 Mich at 176.

gan household must undertake.[45] While replacement services for the household might be necessitated by the injury if the injured person otherwise would have performed them himself, they are not *for* his care and therefore do not fall within the definition of allowable expenses. Nevertheless, the fact that Mrs. Douglas performed *some* replacement services does not preclude recovery for the allowable expenses that *actually were incurred*, including attendant care services. The fact that her attendant care forms list certain replacement services is not dispositive on this issue, especially given that other services listed on those forms can reasonably be considered attendant care services, including traveling to and communicating with plaintiff's medical providers and managing plaintiff's medication.

The circuit court ruled that Mrs. Douglas "is Plaintiff's caretaker and basically spends her free time making sure that Plaintiff is cared for, and does not harm himself as he tried to do in a suicide attempt." This factual finding is not clearly erroneous because it is consistent with Mrs. Douglas's testimony that she was "watching James" even while she was performing household chores by herself. Furthermore, it suggests that the circuit court adopted plaintiff's argument that Mrs. Douglas's supervision constituted attendant care services.

The Court of Appeals rejected defendant's claim that Mrs. Douglas only provided replacement services and

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[45] Plaintiff also argues that while some of Mrs. Douglas's tasks might be considered replacement services, there is therapeutic value in ensuring that plaintiff is involved with these activities, although they require Mrs. Douglas's supervision. However, the testimony adduced at trial undermines this rationale because Mrs. Douglas explained that during the week, when she spent time cooking, washing dishes, cleaning the house, and caring for her children, plaintiff did "[v]ery little" to assist her in these chores, but instead often watched television.

compared the claimed supervision with this state's workers' compensation caselaw that allows "on-call" supervision,[46] even when the care provider is pursuing other tasks while on call.[47] We affirm the result of the Court of Appeals on this issue and hold that defendant is not entitled to a verdict of no cause of action on the basis of its claim that Mrs. Douglas *only* provided replacement services because there was testimony given at trial that at least some of the services she said she had provided were consistent with the requirement of MCL 500.3107(1)(a) that allowable expenses be for an injured person's care as necessitated by the injury sustained in the motor vehicle accident.[48] For instance, even if Mrs. Douglas's claimed supervision of plaintiff does not restore plaintiff to his preinjury state, testimony given at trial indicates that arguably at least some of this claimed supervision was for plaintiff's care as necessitated by the injury sustained in the motor vehicle accident and not for ordinary and necessary services that every Michigan household must undertake. Accordingly, defendant is not entitled to relief on the claim that *none* of Mrs. Douglas's claimed services could be considered attendant care services within the meaning of MCL 500.3107(1)(a).

2. REASONABLY NECESSARY EXPENSES

MCL 500.3107(1)(a) also requires allowable expenses to be "reasonably necessary." In *Krohn v Home-Owners*

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[46] *Morris v Detroit Bd of Ed*, 243 Mich App 189, 197; 622 NW2d 66 (2000) ("[O]n-call care is compensable under the [workers' compensation] statute.").

[47] *Brown v Eller Outdoor Advertising Co*, 111 Mich App 538, 543; 314 NW2d 685 (1981) ("The fact that Mrs. Brown might use her 'on call' time to perform household tasks does not alter the 'nature of the service provided' or the 'need' for the service.").

[48] See *Griffith*, 472 Mich at 535.

Insurance Co, this Court clarified that this requirement "must be assessed by using an objective standard."[49] Defendant questions the reasonable necessity of attendant care services for the period before November 7, 2006, because there was no medical prescription for attendant care services before that date.

Before the circuit court's ruling on defendant's third motion for summary disposition, plaintiff offered the affidavit of Dr. Rosenbaum, who explained that plaintiff "is in need of [attendant] care during all waking hours" and that Mrs. Douglas had provided that care "since [the time of] the motor vehicle accident." The circuit court based its denial of defendant's motion in part on Dr. Rosenbaum's affidavit. In reviewing that decision, the Court of Appeals determined that "the affiant relied on the statements of the parties to determine what activity plaintiff's wife engaged in during the subject period and subsequently evaluated those activities and found them to meet the definition of attendant care."[50] Thus, the panel held that the circuit court did not err by concluding that there were questions of fact sufficient to defeat defendant's motion for partial summary disposition. We agree with the Court of Appeals that questions of fact precluded summary disposition on this issue.

Moreover, we conclude that it was not clear error for the circuit court as fact-finder to conclude that attendant care services were, in fact, reasonably necessary for the period before November 7, 2006. There is a factual basis in the record to support the circuit court's conclusion: Dr. Rosenbaum testified at trial that, as early as 1997, plaintiff's doctors had

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[49] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 163; 802 NW2d 281 (2011).

[50] *Douglas*, unpub op at 4.

recommended that plaintiff receive 24-hour supervision.[51] Furthermore, defendant's claims adjuster agreed with the statement of plaintiff's counsel that, if plaintiff needed attendant care services at the time of trial, "he would have needed [those services] back when the lawsuit first began[.]" This evidence was sufficient for the circuit court to conclude that because attendant care services were reasonably necessary after November 7, 2006 (a point that defendant does not dispute), they were also reasonably necessary before that date. As a result, defendant has not established that the circuit court clearly erred by concluding that plaintiff proved this element of the allowable expenses analysis.

3. INCURRED EXPENSES

MCL 500.3107(1)(a) also limits allowable expenses to "charges incurred." That is, even if a claimant can show that services were for his care and were reasonably necessary, an insurer "is not obliged to pay any amount except upon submission of evidence that services were

[51] Although the circuit court's opinion following the trial referred to Dr. Rosenbaum's affidavit in its conclusion that attendant care services were reasonably necessary, during trial the court had sustained defendant's objection to the admission of that affidavit. However, its reason for granting defendant's objection was that the court had "heard [Dr. Rosenbaum's] live testimony." Because that live testimony clearly supports the circuit court's factual finding, and because the circuit court specifically concluded that Dr. Rosenbaum's "opinion as to the reasonable attendant care needs of [p]laintiff is both appropriate and convincing," the circuit court's error in referring to Dr. Rosenbaum's affidavit, rather than his live testimony, is harmless. See MCR 2.613(A) ("[A]n error in a ruling or order . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.").

actually rendered and of the *actual cost expended*."[52] Because an insurer's liability

> cannot be detached from the specific payments involved, or expenses incurred, . . . [w]here a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense.[53]

This Court has defined "incur" as it appears in MCL 500.3107(1)(a) as " '[t]o become liable or subject to, [especially] because of one's own actions.' "[54] Similarly, a "charge" is a "[p]ecuniary burden, cost" or "[a] price required or demanded for service rendered or goods supplied."[55] Thus, the statutory requirement that "charges" be "incurred" requires some degree of liability that exists as a result of the insured's actually having received the underlying goods or services. Put differently, because a charge is something "required or demanded," the caregiver must have an expectation that she be compensated because there is no "charge[] incurred" when a good or service is provided with *no* expectation of compensation from the insurer.[56] Accord-

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[52] *Manley*, 425 Mich at 159 (emphasis added); see also *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003) (holding that "[b]ecause the expenses in question were not yet 'incurred,' the Court of Appeals erred in ordering defendant to pay the total amount to the trial court" for disbursal to plaintiff as expenses are incurred).

[53] *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 50; 457 NW2d 637 (1990).

[54] *Proudfoot*, 469 Mich at 484, quoting *Webster's II New College Dictionary* (2001) (alterations in original).

[55] 1 *Shorter Oxford English Dictionary* (6th ed), p 385.

[56] Of course, a caregiver who provides services to a family member need not present a formal bill to the family member or enter into a formal contract with that family member in order to satisfy the requirement that the caregiver have an expectation of payment from the *insurer* (although those arrangements will, of course, satisfy the evidentiary

ingly, this Court noted in *Burris v Allstate Insurance Co* that caregivers must have "expected compensation for their services."[57] Without the expectation of compensation, "the evidence fail[s] to establish that the plaintiff 'incurred' attendant-care expenses."[58]

The fact that charges have been incurred can be shown "by various means," including "a contract for products and services" or "a paid bill."[59] The requirement of proof is not extinguished simply because a family member, rather than a commercial health care

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requirements). However, even in the absence of a formal bill or contract, there must be some evidence that the family member expected compensation for providing the services and of the actual services rendered. In other words, there must be some basis for a fact-finder to conclude that the caregiver had *some* expectation of compensation from the insurer, even if the expectation of compensation was not the primary motivation for providing the care. Contrary to the dissent's suggestion, a family member's determination to provide care even in the absence of an insurer's payment is not inconsistent with expecting compensation from the insurer, but the expectation must nevertheless be present for a charge to be incurred within the meaning of MCL 500.3107(1)(a). This expectation of compensation at the time the services were provided simply applies the dictionary definitions of the statutory phrase "charges incurred."

[57] *Burris v Allstate Ins Co*, 480 Mich 1081 (2008).

[58] *Id.* The dissent reintroduces the *Burris* dissent's claim that the interpretation of the word "incur" in *Proudfoot* "was limited to the facts of that case, in which the plaintiff sought advance payment for *future* expenses." *Post* at 281, citing *Burris*, 480 Mich at 1088 (WEAVER, J., dissenting). However, the *Burris* concurrence correctly explained that "[t]his factual distinction . . . is irrelevant to the *Proudfoot* Court's discussion of the meaning of the term 'incur.' " *Burris*, 480 Mich at 1084 (CORRIGAN, J., concurring). *Proudfoot* adopted the dictionary definition of the word "incur," which requires "a legal or equitable obligation to pay." *Id.* Because "there is no basis to treat family members differently than hired attendant-care-service workers . . . , the insured's family members and friends, just like any other provider, must perform the services with a reasonable expectation of payment." *Id.* at 1085. For these reasons, we reject the dissent's characterization of *Proudfoot*.

[59] *Proudfoot*, 469 Mich at 484 n 4.

provider, acts as a claimant's caregiver. Indeed, MCL 500.3107(1)(a) does not distinguish a "charge[] incurred" when a family member provides care from one incurred when an unrelated medical professional provides care.[60] As a result, there is only one evidentiary standard to determine whether expenses were incurred regardless of who provided the underlying services. *Any* insured who incurs charges for services must present proof of those charges in order to establish, by a preponderance of evidence, that he is entitled to PIP benefits.[61]

This evidentiary requirement is most easily satisfied when an insured or a caregiver submits itemized statements, bills, contracts, or logs listing the nature of services provided with sufficient detail for the insurer to determine whether they are compensable.[62] Indeed, the best way of proving that a caregiver actually "expected compensation for [her] services" at the time the

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[60] Because MCL 500.3107(1)(a) does not distinguish "charges incurred" for a family member's services from "charges incurred" for a professional healthcare provider's services, it is the dissent's position that lacks support in the statutory language. Put simply, "charges" must be "incurred" in order to be compensable under the no-fault act. It is this statutory language that we must consider as the expression of legislative intent because "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

[61] See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 380; 670 NW2d 569 (2003) (noting the preponderance of the evidence standard for proof that an allowable expense is reasonable and necessary), aff'd 472 Mich 91 (2005).

[62] In *Proudfoot*, we reiterated that payments for *future* services and products are not due until the expenses are actually incurred. For instance, we explained that while "[a] trial court may enter 'a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed[,] . . . [s]uch a declaration does not oblige a no-fault insurer to pay for an expense until it is actually incurred.' " *Proudfoot*, 469 Mich at 484, quoting *Manley*, 425 Mich at 157.

services were rendered[63] is for the caregiver to document the incurred charges contemporaneously with providing them—whether in a formal bill or in another memorialized statement that logs with specificity the nature and amount of services rendered—and submit that documentation to the insurer within a reasonable amount of time after the services were rendered. While no statutory provision *requires* that this method be used to establish entitlement to allowable expenses—a caregiver's testimony can allow a fact-finder to conclude that expenses have been incurred—a claimant's failure to request reimbursement for allowable expenses in a timely fashion runs the risk that the one-year-back rule will limit the claimant's entitlement to benefits, as occurred here when plaintiff commenced a lawsuit to recover allowable expenses that were alleged to have been incurred more than one year earlier.[64] Moreover, once a claimant seeks payment from the insurer for providing ongoing services, the insurer can request regular statements logging the nature and amount of those services to ensure that the claimed services are compensable.

The problem of a caregiver's failure to provide contemporaneous documentary evidence of allowable expenses is aptly illustrated in this case, in which Mrs.

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[63] *Burris*, 480 Mich at 1081.

[64] As noted previously, it would seem to be inherent in the notion of expectation of compensation that there is some requirement for the caregiver to give notice to the insurer that payment is being sought for particular compensable services. However, MCL 500.3107(1)(a) does not require a claim for allowable expenses to occur within any particular time. Nevertheless, the one-year-back rule may preclude recovery for a claimant who sits on his or her entitlement to benefits without doing *anything* to attempt recovery (including commencing a lawsuit). Thus, MCL 500.3145(1) states that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

Douglas submitted documents constructed in one day as proof of services rendered over the course of approximately three years. The lack of contemporaneous documentation implicates her credibility regarding whether the services were actually rendered in the manner documented.[65] Moreover, this failure to provide contemporaneous documentation may also be relevant to the fact-finder's determination whether Mrs. Douglas actually expected payment for providing those services. In this case, the circuit court failed to make a finding regarding whether the charges were actually incurred, including whether Mrs. Douglas expected compensation or reimbursement at the time she provided the services. Nevertheless, the circuit court awarded plaintiff attendant care benefits for 67 hours a week for the period between May 31, 2004, and November 1, 2007, and 40 hours a week for the period between November 1, 2007, and November 18, 2009. The Court of Appeals remanded this case to the circuit court and allowed the circuit court to "take additional testimony, if necessary, and amend its findings or render new findings, and amend the judgment accordingly."[66] The panel identified three problems with the circuit court's award of attendant care benefits: the circuit court "clearly erred in awarding attendant care benefits to plaintiff without requiring sufficient documentation to support the daily or weekly hours underlying the award";[67] it erred by failing to consider "whether [Mrs. Douglas] reasonably expected compensation at the time of performance";[68]

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[65] Contrary to the dissent's suggestion, this observation does not in any way invade the province of the fact-finder, who remains in the best position to weigh the credibility of all the evidence that a claimant presents to support a claim of entitlement to benefits.

[66] *Douglas*, unpub op at 7.

[67] *Id.*

[68] *Id.*

and it erred by failing to account for payments made to Dr. Rosenbaum's agency, TheraSupport, which employed Mrs. Douglas as plaintiff's attendant care provider.[69]

We underscore the importance of the proofs necessary to establish entitlement to benefits. The circuit court issued a judgment in favor of plaintiff without finding that the expenses were *actually incurred* given that its determination of the number of hours to award plaintiff had no discernible basis in the evidence presented at trial and did not examine whether Mrs. Douglas had the expectation of payment for her services. While it awarded plaintiff benefits for 40 hours a week of attendant care services for the period beginning November 1, 2007, in accord with Dr. Rosenbaum's prescription, there is no basis for its findings that Mrs. Douglas *actually* provided 40 hours of care each week during that period. Indeed, because she was unavailable to provide services during her working hours, there is no basis for compensating her for any hours that she spent working outside the home.[70] Similarly, the award for the period before November 1, 2007, was made with no discernible basis in the record. Therefore, the Court of Appeals properly recognized that that award could not be sustained and appropriately remanded this case for findings of fact based on the evidence.[71]

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[69] *Id*. Plaintiff did not cross-appeal the Court of Appeals' determination that the circuit court clearly erred by awarding PIP benefits for allowable expenses without sufficient proof to support the underlying award.

[70] The court explained, for instance, that "Katherine is the person to [provide care], but she cannot because she is employed full-time outside of the home and because [d]efendant will not pay the appropriate care rate for any hours of her care for [p]laintiff."

[71] Defendant claims that the Court of Appeals' decision to remand was improper because plaintiff already had an opportunity to present proofs regarding the attendant care services that Mrs. Douglas provided.

Although the Court of Appeals established the scope of the determination of remand to the period after November 7, 2006, we direct the circuit court to make findings of fact as they pertain to the entire period of the lawsuit. The Court of Appeals did not explain how it decided that only the period after November 7, 2006, should be considered on remand, and more important, there is nothing in the Court of Appeals' opinion or in the circuit court record that indicates that the circuit court's award for the period between May 31, 2004, and November 7, 2006, falls outside the ruling of the Court of Appeals that the circuit court "award[ed] attendant care benefits to plaintiff without requiring sufficient documentation to support the daily or weekly hours underlying the award."[72] Accordingly, we vacate the

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Instead, defendant claims that since the Court of Appeals' ruling that the circuit court did not "requir[e] sufficient documentation to support the daily or weekly hours underlying the award" is uncontested, a verdict of no cause of action should be entered. *Douglas*, unpub op at 7. We disagree. The Court of Appeals acknowledged that "the trial evidence in this case did not reflect that Katherine maintained records of her claimed attendant care" and that, "[a]t most, there was evidence that Katherine completed 'affidavit of attendant care services' forms on June 25, 2007, for certain past months in an effort to reconstruct her time." *Id.* at 6-7. The holding of the Court of Appeals emphasized the fact that the circuit court's findings were legally insufficient, and the Court of Appeals' decision, while highly critical of some of the proofs provided, did not indicate that the circuit court could not sustain *any* award for attendant care services. Accordingly, we affirm the Court of Appeals' decision to remand for findings of fact regarding whether, and to what extent, allowable expenses were actually incurred in this case, and we do not disturb the Court of Appeals' ruling that the circuit court may take additional testimony on remand. See MCR 7.216(A)(5).

[72] *Douglas*, unpub op at 7. The only discernable significance of that date in the record is that November 7, 2006, represents the date plaintiff began treatment with Dr. Rosenbaum. While we considered the significance of this date in determining whether services were "reasonably necessary" in the absence of a specific prescription for attendant care, this date has no independent significance in determining whether services were actually incurred.

entire award of attendant care benefits and clarify that on remand the circuit court must examine the entire period to determine whether plaintiff submitted sufficient proofs that allowable expenses were incurred but not reimbursed.[73]

4. REASONABLE CHARGE FOR EXPENSES

Once a fact-finder has concluded that a plaintiff incurred allowable expenses in receiving care from a family member, the fact-finder must determine whether the charge is "reasonable."[74] In this case, the circuit court awarded attendant care benefits to plaintiff at a $40 hourly rate. Although the circuit court did not explicitly state the basis of its hourly rate, the Court of Appeals identified two pieces of evidence adduced at trial as justification for the circuit court's ruling: Dr. Rosenbaum's testimony that his company charges $40 an hour for attendant care and the testimony of defendant's adjuster regarding the rates that commercial agencies charge for attendant care services. We conclude that this testimony regarding the rates that commercial agencies charge is based on factors too attenuated from those underlying the rate charged for an individual's provision of attendant care services to be adopted as an individual's reasonable charge for attendant care services. This is a particularly erroneous circuit court finding given that Mrs. Douglas was actually paid $10 an hour by Dr. Rosenbaum's company for providing attendant care services to her husband. Why

[73] We also note the observation of the Court of Appeals that the circuit court failed to consider the extent to which defendant had already paid benefits for the attendant care services that Mrs. Douglas performed while serving as Dr. Rosenbaum's employee. Any award issued on remand must not include services that have already been reimbursed.

[74] MCL 500.3107(1)(a).

the circuit court believed that the commercial rate Dr. Rosenbaum charged was more relevant than what he paid Mrs. Douglas is unstated and unjustified on this record. Accordingly, the circuit court's $40 hourly rate is clearly erroneous.

Although this Court has not ruled on the issue, the Court of Appeals in *Bonkowski v Allstate Insurance Co* stated that a commercial agency's rate for attendant care services is irrelevant to the fact-finder's determination of what constitutes a reasonable rate for a family member's provision of those services. Then Judge ZAHRA, writing for the court, noted that "[i]n determining reasonable compensation for an unlicensed person who provides health care services, a fact-finder may consider the compensation paid to licensed health care professionals who provide similar services."[75] The opinion went on to state that the fact-finder's "focus should be on the compensation provided to the person providing the services, not the charge associated by an agency that hires health care professionals to provide such services."[76]

The compensation actually paid to caregivers who provide similar services is necessarily relevant to the fact-finder's determination of a reasonable charge for a family member's provision of these services because it helps the fact-finder to determine what the caregivers could receive on the open market. While a commercial agency's fee incorporates this relevant piece of data—the compensation it pays to its caregivers—it also incorporates additional costs into its charge that family members who provide services do not incur, particularly the overhead costs inherent in the agency's provision of

[75] *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164; 761 NW2d 784 (2008), citing *Van Marter*, 114 Mich App at 180-181.

[76] *Bonkowski*, 281 Mich App at 165.

services. Thus, the total agency rate is too attenuated from the particular component of the agency rate that the fact-finder must determine in the instant case—"the compensation provided to the person providing the services . . . ."[77]

While we do not adopt the reasoning in *Bonkowski* in its entirety, we agree with *Bonkowski* that the fact-finder's focus must be on an *individual's* compensation. Accordingly, we hold that a fact-finder may base the hourly rate for a family member's provision of attendant care services on what health care agencies compensate their employees, but what health care agencies charge their patients is too attenuated from the appropriate hourly rate for a family member's services to be controlling.[78] Rather, the fact-finder must determine what is a reasonable charge for an *individual's* provision of services, not an agency's. While an agency rate might bear some relation to an individual's rate, it cannot be uncritically adopted as an individual's rate in the absence of specific circumstances that warrant such a rate—for instance, when the individual caregiver has overhead and administrative costs similar to those of a commercial agency.[79]

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[77] *Id.*

[78] Contrary to the dissent's suggestion, we believe that in appropriate circumstances the fact-finder should consider benefits that a full-time attendant care services employee would receive as part of her total compensation package. Indeed, *Bonkowski*'s use of the term "compensation," rather than "wage," further supports this conclusion. *Bonkowski*, 281 Mich App at 165.

[79] While this case is not about the *admissibility* of the agency rates, which may in fact be helpful to the fact-finder as a point of comparison in determining a reasonable charge for an individual's provision of attendant care services, in this instance, we conclude that the fact-finder clearly erred by adopting that rate as the appropriate hourly rate for Mrs. Douglas's provision of attendant care services.

This case does not reflect such circumstances. Rather, there is undisputed testimony that Mrs. Douglas actually received $10 an hour in providing attendant care services to plaintiff during the time she served as Dr. Rosenbaum's employee. Because this figure is the rate she *actually* received for providing attendant care services, it is highly probative of what constitutes a reasonable charge for her services. Therefore, we agree with defendant that the circuit court clearly erred by ruling that plaintiff is entitled to a $40 hourly rate for Mrs. Douglas's attendant care services. The only evidentiary basis for that figure is the rate that commercial agencies charge for attendant care services, and that rate is far too attenuated from an individual caregiver's actual rate of compensation to serve as the sole basis for the award of benefits in these circumstances.[80] Therefore, if the circuit court concludes on remand that plaintiff has proved his entitlement to benefits for Mrs. Douglas's services, the circuit court, as fact-finder, must establish a new hourly rate based on an individual caregiver's hourly rate.

IV. CONCLUSION

Today we reaffirm that MCL 500.3107(1)(a) imposes four requirements that an insured must prove before recovering PIP benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the

[80] The dissent's claim that "the trial court heard testimony from which it could conclude that Mrs. Douglas would need to quit her job outside the home in order to provide plaintiff with the attendant care his doctor prescribed" is simply irrelevant to determining the reasonable charge for attendant care services that were provided *while* Mrs. Douglas was employed outside the home. *Post* at 293-294.

charge must be reasonable.[81] Allowable expenses are distinguished from replacement services in that allowable expenses are *for* the insured's care as it "relate[s] to the insured's injuries."[82]

Defendant is not entitled to relief on its claim that Mrs. Douglas provided only replacement services, not allowable expenses, because the circuit court did not clearly err by ruling that Mrs. Douglas is plaintiff's caretaker. Defendant is also not entitled to relief on its claim that plaintiff's attendant care was not reasonably necessary in the absence of a specific prescription for attendant care services because the testimony of Dr. Rosenbaum and defendant's claims adjuster provided a factual basis for the reasonable necessity of those services at all times relevant in this case.

We affirm the Court of Appeals' decision to remand this case for further proceedings, but we hold that the consideration on remand must encompass the entire period for which charges are claimed. We also emphasize the necessity that the circuit court, as the factfinder, must base its ruling on proofs that show the extent to which Mrs. Douglas *actually provided* compensable attendant care services. Therefore, on remand, the circuit court must apply the standard of proof outlined in this opinion to determine whether plaintiff has proved that "charges" were "incurred" for his care. In particular, the circuit court must determine the extent to which plaintiff has proved the number of hours that Mrs. Douglas actually provided attendant care services and whether she actually expected compensation for those services. Finally, we reverse the Court of Appeals' decision regarding the circuit court's assessment of an hourly rate of $40 and conclude that

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[81] See *Griffith*, 472 Mich at 532 n 8.

[82] *Id.* at 534.

that hourly rate is clearly erroneous because it is unrelated to an individual caregiver's hourly rate. While we do not establish an hourly rate in this case, the circuit court must establish a rate that is consistent with an individual caregiver's rate for services, rather than a commercial agency's rate.

Affirmed in part, reversed in part, award of attendant care benefits vacated and case remanded for further proceedings consistent with this opinion.

MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

CAVANAGH, J. (*dissenting*). I dissent from the majority's erroneous interpretation of the phrase "charges incurred" in MCL 500.3107(1)(a) and the resulting creation of evidentiary requirements that lack any basis in the statutory language. Likewise, I dissent from the majority's misguided limitation on the scope of evidence that may be considered when determining whether a charge is "reasonable" under MCL 500.3107(1)(a).[1]

Although the rules of statutory interpretation are well established, a brief review is warranted, given the majority's failure to adhere to these principles. This Court's primary goal is to "discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide the most reliable evidence of its intent . . . ." *Id*. (quotation marks and citation omitted). When the language of a statute is unambiguous, "the

[1] Additionally, I continue to believe that the interpretation of MCL 500.3105 and MCL 500.3107 from the majority opinion in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), which the majority applies in this case, is incorrect for the reasons provided in Justice MARILYN KELLY's *Griffith* dissent. See *id*. at 542-554 (MARILYN KELLY, J., dissenting).

Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* Accordingly, "[n]o further judicial construction is required or permitted." *Id.*

I. "CHARGES INCURRED"

Under MCL 500.3107(1)(a), personal protection insurance (PIP) benefits include "allowable expenses." The statute goes on to explain that an "allowable expense" consists of, among other things, "charges incurred" for certain qualifying products or services. From the words "charges incurred," the majority mysteriously divines new evidentiary requirements that an insured must satisfy in order to obtain PIP benefits. Specifically, the majority determines that, in order to show that charges were incurred, an insured must establish (1) that the caregiver expected compensation for the services rendered, see *ante* at 267, and (2) that the caregiver's expectation of payment arose "at the time [the caregiver] provided the services," see *ante* at 271.[2] Neither of the majority's newly created requirements are supported by the statutory language at issue.

A. CAREGIVER'S EXPECTATION OF COMPENSATION

I disagree with the majority's conclusion that MCL 500.3107(1)(a) requires a showing that the caregiver expected compensation. Rather, I continue to believe that the caregiver's expectation of payment is irrelevant because the obligation to pay "charges incurred"

[2] Included within the majority's conclusion that a caregiver must expect payment is an additional preference that documentation of the charges be provided in a "memorialized statement" because the majority considers such documentation to be the "best way of proving" entitlement to PIP benefits. *Ante* at 269-270. For the reasons discussed in part I(A), I disagree.

under MCL 500.3107(1)(a) lies with the *insurer* rather than the insured. *Burris v Allstate Ins Co*, 480 Mich 1081, 1088-1089 (2008) (WEAVER, J., dissenting). I also disagree with the majority's reliance on the definition of "incur" that was adopted in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003), because, as Justice WEAVER explained in her *Burris* dissent, *Proudfoot*'s definition of "incur" was limited to the facts of that case, in which the plaintiff sought advance payment for *future* expenses. *Burris*, 480 Mich at 1088 (WEAVER, J., dissenting). Accordingly, in *Proudfoot*, no one had incurred an expense because no service had been provided, and an insurer "is not obligated to pay any amount except upon submission of evidence that services were actually rendered . . . ." *Manley v Detroit Auto Inter-Ins Exch*, 425 Mich 140, 159; 388 NW2d 216 (1986). In this case, however, plaintiff seeks benefits for *past* expenses resulting from services that *have already been provided*. Accordingly, as long as the services were actually rendered and reasonably necessary and the amount of the charges was reasonable, defendant, as the insurer, has incurred the charges because of its statutory obligation to provide PIP benefits under MCL 500.3107(1). Unlike the majority's interpretation, Justice WEAVER's approach in *Burris* is consistent with the Legislature's intent that the no-fault act be construed liberally in favor of the insured. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995).

In addition, I disagree with the majority's effort to further hamstring insureds' ability to recover PIP benefits to which they are entitled by imposing burdensome and statutorily unsupported preferences for specific documentary evidence. See *ante* at 269-270 (stating that the "best way of proving" that a caregiver expected payment is a "formal bill" or "memorialized state-

ment").[3] To begin with, the majority's determination that certain forms of evidence are always more persuasive than others is faulty because it is premised on the majority's conclusion that the caregiver must expect compensation. However, even accepting arguendo that compensation must be expected in order for a charge to be incurred for purposes of MCL 500.3107(1)(a), nothing in the statutory language supports the majority's gradation of the persuasiveness of various forms of evidence or the majority's resulting preference for a formal bill or memorialized statement. Particularly telling is the majority's failure to cite any authority in support of this preference for certain types of evidence. Indeed, the majority flatly admits that "no statutory provision *requires*" what the majority considers to be the "best" evidence. *Ante* at 270. Accordingly, although I agree that "itemized statements, bills, contracts, or logs listing the nature of services provided," *ante* at 269, would be more than enough to establish entitlement to PIP benefits, simple testimony or any other form of admissible evidence should also be sufficient.[4] See, generally, MRE 402 (providing that "[a]ll relevant evi-

[3] As the majority opinion states, a formal bill or memorialized statement is not the *only* method sufficient to show that an insured is entitled to PIP benefits. See *ante* at 270 (acknowledging that "a caregiver's testimony can allow a fact-finder to conclude that expenses have been incurred"). Accordingly, despite the majority's unsupported conclusion that documentary evidence is "best," *any form of admissible evidence* could be equally sufficient to meet an insured's burden to prove that services were actually rendered.

[4] The majority apparently interprets my dissent as asserting that when a family member provides care, the insured need not provide any evidence that attendant care was actually provided. See *ante* at 269 n 60. This is not an accurate characterization of my dissent, however, because I agree that an insurer "is not obligated to pay any amount except upon submission of evidence that services were actually rendered . . . ." *Manley*, 425 Mich at 159. Rather, as I previously stated, I disagree with the majority's unsupported preference for *specific documentary evidence*

dence is admissible . . .") and MRE 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Although the majority may be correct that certain types of evidence may be more persuasive under the specific circumstances of a particular case, by discussing the persuasiveness of various forms of evidence in absolutes, the majority invades the province of the fact-finder. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992) ("[A]ppellate courts are not juries, and . . . they must not interfere with the jury's role[.]"). Indeed, this error in the majority's approach is exposed in its discussion of the specific facts of this case, particularly the majority's statement that failure to provide certain documents "implicates [the caregiver's] credibility . . . ." *Ante* at 271. However, contrary to the majority's willingness to weigh in on witness credibility, this Court has frequently stated that appellate courts

> must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. [*Wolfe*, 440 Mich at 514-515 (quotation marks and citation omitted).]

In summary, I disagree with the majority's conclusion that an insured must prove that a family caregiver expected compensation in order to prove that charges were incurred for purposes of MCL 500.3107(1)(a). In my view, the insurer incurs the charge by way of its

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because, in my view, *any form of admissible evidence* could be equally sufficient to meet an insured's burden to prove that services were actually rendered.

statutory obligation to provide PIP benefits under MCL 500.3107(1)(a) when the insured proves that the services were reasonably necessary and actually rendered and that the amount of the charge is reasonable. Furthermore, accepting arguendo the majority's declaration that an insured must prove that his or her caregiver expected compensation, I disagree with the majority's implication that certain forms of evidence will always be the "best way" to establish entitlement to PIP benefits. Not only does the majority admit that there is no statutory support for its conclusion, see *ante* at 269-270, the idea that an appellate court can determine the best evidence in a case has been consistently rejected as an improper invasion of the fact-finder's role as "the *sole* judge of the facts." *Wolfe*, 440 Mich at 514 (quotation marks and citation omitted; emphasis added).

B. TIMING OF EXPECTATION AND REQUEST FOR PAYMENT

The majority creates another unsupported and previously nonexistent requirement when it states that a caregiver must expect compensation "at the time the services were rendered." *Ante* at 269-270; see, also, *ante* at 271 (stating that the "circuit court failed to make a finding regarding . . . whether Mrs. Douglas expected compensation or reimbursement *at the time she provided the services*") (emphasis added). Again, the majority fails to identify any support for this new timing requirement in either the caselaw or the statutory language of MCL 500.3107(1)(a). The reason for the majority's failure to do so is obvious: there simply is no support for the majority's judicially created requirement. This is particularly notable given that members of the majority have often railed against extratextual requirements. See, e.g., *People v Schaefer*, 473 Mich

418, 432; 703 NW2d 774 (2005).[5] Indeed, in *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999), the majority opinion expressly overruled a previous Court of Appeals opinion that had inserted a "reasonable time" requirement into the statute at issue in that case, stating "[N]o sound reason exists to engraft the 'reasonable time' element onto the clear language of the statute." Accordingly, I am at a loss about why the majority believes it is appropriate to engraft a time requirement onto MCL 500.3107(1)(a) despite the lack of any such requirement in the actual language of the statute.[6]

Although the lack of support in the statutory language is reason enough to reject the majority's analysis, the practical implications of the majority's burdensome

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[5] See, also, *Johnson v Recca*, 492 Mich 169, 196-197; 821 NW2d 520 (2012), stating that

> it must be assumed that the language and organization of the statute better embody the "obvious intent" of the Legislature than does some broad characterization surmised or divined by judges. . . . It is not for this Court to "enhance" or to "improve upon" the work of the lawmakers where we believe this can be done, for it will always be easier for 7 judges on this Court to reach agreement on the merits of a law than 110 state representatives and 38 state senators representing highly diverse and disparate constituencies. Therefore, this Court must . . . rest its analysis on the language and organization of the statute.

[6] The majority also expresses its belief that an insured should submit evidence "to the insurer *within a reasonable amount of time* after the services were rendered," *ante* at 270 (emphasis added). See, also, *ante* at 270 (discussing the "risk" of "fail[ing] to request reimbursement for allowable expenses *in a timely fashion* . . . .") (emphasis added). However, the majority admits that "MCL 500.3107(1)(a) does not require a claim for allowable expenses to occur within any particular time." *Ante* at 270 n 64. Thus, it is unclear to me why the majority chooses to create potential confusion by injecting the statutorily unsupported phrases "within a reasonable amount of time" and "in a timely fashion" into its application of MCL 500.3107(1)(a).

new requirement is also worth consideration. Specifically, by requiring that a family caregiver expect compensation, not only does the majority punish a family member who nobly acts to provide care to a loved one in a time of need, the majority also rewards *the insurer*, rather than the caregiver, for this act of kindness by allowing the insurer to avoid providing PIP benefits that it would otherwise be required to provide. This result is not only ethically troubling, but it also turns on its head the Legislature's intent that the no-fault act be construed liberally in favor of the *insured*. *Turner*, 448 Mich at 28.

Additionally, by requiring that the caregiver expect compensation at the time the services are provided, the majority fails to recognize the reality of situations in which attendant-care services are needed. Specifically, claims for PIP benefits arise out of automobile-related accidents, which were typically sudden, unexpected events. Accordingly, family members may unexpectedly be called upon to immediately provide care to a loved one. Given the nature of most families, I believe that in the vast majority of situations, the family member would be willing to provide the care, at least initially, without any contemporaneous expectation of compensation from anyone. Thus, I believe that it may be fairly common that the caregiver is initially not even aware of the possibility of compensation and the process that must be completed in order to recover that compensation. Indeed, not every citizen is an attorney well versed in the intricacies of the no-fault act. As a result, *at the time the services were provided*, the caregiver would have no expectation that *anyone* will provide compensation. Yet under the majority's analysis, if a family member did not expect compensation *at the time the services were provided*, despite the sudden and chaotic circumstances of the situation, he or she is not entitled

to retroactively expect compensation for services provided in the past after discovering that compensation is a realistic possibility. This approach rewards the insurer by allowing it to avoid providing PIP benefits that it would otherwise be obligated to provide under MCL 500.3107(1)(a) merely because the caregiver does not immediately demand compensation.[7]

II. DETERMINING WHAT IS A "REASONABLE CHARGE"

Under MCL 500.3107(1)(a), PIP benefits are payable for "allowable expenses" as long as the charge is "reasonable."[8] In this case, the trial court, acting as the

[7] The majority dismisses as unfounded my concerns regarding the practicalities of the majority's new requirements, stating that "[c]ontrary to the dissent's suggestion, a family member's determination to provide care even in the absence of an insurer's payment is not inconsistent with expecting compensation from the insurer, but the expectation must nevertheless be present for a charge to be incurred within the meaning of MCL 500.3107(1)(a)." *Ante* at 268 n 56. However, this statement only addresses the *source* of the compensation, not the *timing* of when the caregiver developed the expectation of payment, regardless of the source. Under the circumstances that I discuss, the family caregiver does not expect compensation "at the time the services were rendered," *ante* at 269-270, which is an express requirement of the majority's erroneous interpretation of MCL 500.3107(1)(a). The majority claims that its requirement that compensation be expected at the time the services were provided "simply applies the dictionary definitions of the statutory phrase 'charges incurred.' " *Ante* at 268 n 56. However, even accepting the dictionary definitions that the majority selects, there is clearly no time component to those definitions. See *ante* at 267 (defining "incur" as "[t]o become liable or subject to, [especially] because of one's own actions," and "charge" as a "[p]ecuniary burden, cost" or "[a] price required or demanded for service rendered or goods supplied") (quotation marks and citations omitted). Indeed, applying these definitions, it is clear that a person could "become liable" for "a price demanded for services" *after* the services are rendered.

[8] The majority incorrectly states that "the fact-finder must determine what is a reasonable charge for an *individual's* provision of services . . . ." *Ante* at 276. Rather, the plain language of MCL 500.3107(1)(a) simply requires that the charge be "reasonable." Accordingly, although what an

fact-finder in a bench trial, heard testimony from two sources regarding the rate typically charged by an agency to provide the care that Katherine Douglas provided. Additionally, the trial court heard testimony that while Dr. Thomas Rosenbaum's company employed Mrs. Douglas, she was paid at a rate of $10 an hour. Furthermore, the trial court heard testimony that Mrs. Douglas was unable to provide the hours of attendant care that plaintiff's doctor prescribed because she worked outside the home. After considering that testimony, the trial court awarded plaintiff PIP benefits at the rate of $40 an hour. In my view, agency rates are relevant to determining the proper rate of compensation for PIP benefits, and the trial court in this case properly considered the agency rates along with the other evidence submitted by the parties. Accordingly, I disagree with the majority that the trial court clearly erred in this case, and I would affirm the Court of Appeals on this issue.

Although the majority concludes that agency rates are both relevant and admissible in determining a "reasonable charge" under MCL 500.3107(1)(a), see *ante* at 276 n 79 (stating that "this case is not about the *admissibility* of the agency rates" because agency rates "may in fact be helpful to the fact-finder as a point of comparison in determining a reasonable charge for an individual's provision of attendant care services"); and *ante* at 276 (stating that "an agency rate might bear some relation to an individual's rate"), the majority nevertheless relies exclusively on the Court of Appeals' opinion in *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 165; 761 NW2d 784 (2008), which expressly stated

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individual on the open market may be able to obtain as compensation is relevant, it is but one factor in a multifactor analysis to determine what is a "reasonable charge" under the circumstances of a particular case.

that agency rates are "not relevant." I disagree with the majority's reliance on *Bonkowski* for several reasons.

To begin with, *Bonkowski* readily admitted that its entire discussion of the rate of compensation was dictum, stating that issue was not "squarely before" the Court. *Id.* at 164. Moreover, without justification, *Bonkowski* admittedly ignored caselaw that found agency rates relevant to determining the proper rate of compensation for a family member's provision of care. *Id.* (acknowledging that the Court of Appeals had "previously embraced the notion that 'comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed [by family members]' "), quoting *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444, 455; 339 NW2d 205 (1983) (alteration in original). Further, *Bonkowski* cited no authority in support of its preferred approach to determining the proper rate of compensation for attendant care provided by unlicensed family members.

Most importantly, however, *Bonkowski* is poorly reasoned and, as a result, unpersuasive. Particularly unpersuasive is the notion that only the hourly rate paid to an attendant-care-services provider by an agency is relevant. Indeed, even the majority rejects this perspective. See *ante* at 276 n 79 (acknowledging that agency rates "may in fact be helpful to the fact-finder").[9] Accordingly, the majority is unwise to rely on *Bonkowski*'s

[9] The majority, however, also risks creating confusion when it states that the amount Mrs. Douglas was paid while employed by Dr. Rosenbaum "is highly probative of what constitutes a reasonable charge for her services" because "this figure is the rate she *actually* received for providing attendant care services . . . ." *Ante* at 277. This statement could be misinterpreted and lead lower courts to conclude that a professional caregiver's hourly rate is the *only* relevant evidence. Thus, to clarify, I

analysis of this issue. Rather, I would adopt the reasoning from Judge GLEICHER's majority opinion in *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651; 819 NW2d 28 (2011).

Hardrick, 294 Mich App at 678-679, first noted that the question whether expenses are reasonable is generally a question for the fact-finder, as this Court stated in *Nasser*, 435 Mich at 55. Second, *Hardrick* agreed with *Bonkowski* that "the rates charged by an agency to provide attendant-care services are not dispositive of the reasonable rate chargeable by a relative caregiver," but the opinion also concluded that "this does not detract from the relevance of such evidence." *Hardrick*, 294 Mich App at 666. Accordingly, I find persuasive *Hardrick*'s decision to review the issue through the lens of the admissibility of evidence. *Hardrick* explained that evidence is "relevant" and thus "material" when it helps prove a proposition that is a "material fact at issue." *Id.* at 667-668. Because the "material fact at issue" is the reasonable rate for attendant-care services for an insured, and insurers routinely pay agency rates for attendant-care services, *Hardrick* concluded that agency rates are relevant to determining the proper compensation for relative caregivers. *Hardrick* emphasized that the issue "is not whether an agency rate is reasonable per se under the circumstances, but whether evidence of an agency rate may assist a jury in determining a reasonable charge for family-provided attendant-care services." *Id*. at 669. Accordingly, because an agency rate commonly paid by insurers " 'throws some light, however faint,' on the reasonableness of a charge for attendant-care services," it is admissible. *Id*., citing *Beaubien v Cicotte*, 12 Mich 459, 484 (1864).

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agree with the majority that agency rates may be considered by the fact-finder in determining what constitutes a "reasonable charge" under MCL 500.3107(1)(a).

Moreover, *Hardrick* explained that the fact-finder "may ultimately decide that an agency rate carries less weight than the rate charged by an independent contractor, or no weight at all. But the fact that different charges for the same service exist in the marketplace hardly renders one charge irrelevant as a matter of law." *Hardrick*, 294 Mich App at 669. Indeed, the insurer would be free to introduce evidence showing the actual pay received by professional attendant-care-services providers and the overhead costs incurred by agencies that provide the care along with any other relevant evidence. In fact, in this case, defendant was permitted to counter plaintiff's evidence of the agency rate paid by Dr. Rosenbaum's company by showing that Mrs. Douglas was paid $10 an hour and with testimony from both defendant's medical expert and its claims adjuster. This is the critical error in the majority's reasoning: it fails to recognize that evidence of agency rates is only one of the various types of evidence that the fact-finder may consider in determining what constitutes a "reasonable charge," and the decision of which evidence is most relevant should be left to the fact-finder. Accordingly, I disagree with the majority's decision to opine regarding the weight that the fact-finder should give agency rates relative to other types of evidence when determining what constitutes a "reasonable charge." By doing so, the majority again forgets that "appellate courts are not juries, and . . . they must not interfere with the jury's role[.]" See *Wolfe*, 440 Mich at 514 (1992).

Indeed, by adopting *Bonkowski*'s emphasis on an individual caregiver's hourly rate, the majority's approach ignores other relevant considerations. For example, the family member might be forced to abandon a more lucrative career or move a great distance in order to be able to provide long hours of care to a loved one over an extended period. Additionally, the majority's

approach marginalizes the fact that a family member who provides attendant-care services may be left without an array of benefits that a professional attendant-care-services provider would ordinarily receive. For example, a professional attendant-care-services provider who is employed by an agency might receive health insurance benefits, vacation and sick leave, and retirement benefits, among other things. None of these benefits are represented in the professional attendant-care-services provider's hourly wage.[10] Thus, by singularly focusing on the rate paid to an attendant-care-services professional in order to determine what is a "reasonable charge" for family-provided care under MCL 500.3107(1)(a), the majority fails to recognize the complexity of the inquiry at hand and reduces the determination to a purely economic decision when that is simply not the reality of the situation.

Furthermore, by implying that certain evidence is deserving of greater consideration when determining a "reasonable charge," the majority risks making the possibility of family-provided attendant care unattainable for a large number of no-fault insureds because their family members simply cannot afford to suffer the financial ramifications of that decision. This result not only potentially places families in the unenviable position of being forced to institutionalize a family member in order to make a fair living, but it also runs counter to one of the goals of the no-fault act: to keep no-fault

[10] I recognize that the majority briefly considers the issue of fringe benefits, see *ante* at 272 n 69, but the majority relegates the issue to a mere secondary consideration by repeatedly emphasizing that "Mrs. Douglas actually received $10 an hour in providing attendant care services to plaintiff," *ante* at 277. See, also, *ante* at 277 (stating that the $10 an hour rate is "highly probative" of what is a reasonable charge under MCL 500.3107(1)(a) because it was "the rate [Mrs. Douglas] *actually* received for providing attendant care services").

insurance affordable. See *Shavers v Attorney General*, 402 Mich 554, 627-628; 267 NW2d 72 (1978). Specifically, if a family member cannot afford to provide attendant care at the lower rate that the majority opinion essentially mandates, the insured may be forced into an institution, which will potentially increase the cost of attendant care and, therefore, the amount of PIP benefits that insurers must pay.

Finally, although the majority is correct that this Court has not previously considered this exact issue, the Court of Appeals' approach in *Hardrick* is more consistent with this Court's opinion in *Manley*, 425 Mich at 154, which considered the "reasonable charge" aspect of MCL 500.3107(1)(a) and held that evidence of a daily charge *by facilities* for "room and board" is admissible to determine a parent's costs for room and board of a disabled child *in the parent-caregiver's home*. See, also, *Manley*, 425 Mich at 169 (BOYLE, J., concurring in part and dissenting in part) (stating that "comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed by [a family member]") (quotation marks and citation omitted). Thus, given this Court's guidance on the issue in *Manley*, and because I believe that *Hardrick*'s analysis is more thorough and well reasoned than *Bonkowski*'s, I would adopt *Hardrick*'s analysis.

Applying *Hardrick*'s approach to this case, I would affirm the trial court's conclusion that $40 an hour is a "reasonable charge." The majority claims that the trial court's finding is "unjustified on this record"; however, the majority fails to consider a variety of factors that were before the fact-finder in this case. Specifically, the trial court heard testimony from which it could conclude that

Mrs. Douglas would need to quit her job outside the home in order to provide plaintiff with the attendant care his doctor prescribed. Moreover, the trial court heard testimony regarding both the agency rate and individual rate of pay for the type of care that Mrs. Douglas was providing. Notably, defendant could have submitted additional evidence in support of its claim for a lower hourly rate, but it chose not to do so. Thus, while the majority is correct that it is "undisputed" that "Mrs. Douglas actually received $10 an hour in providing attendant care services to plaintiff," *ante* at 277, it is also undisputed that agencies receive a higher rate of compensation for the same services, and it is also undisputed that Mrs. Douglas could not provide the attendant care that plaintiff needed while maintaining her employment outside the home. Thus, the rate paid to an individual caregiver fails to encompass all the ramifications of Mrs. Douglas's provision of attendant care to plaintiff. Accordingly, because "[t]he trier of facts is permitted to draw natural inferences from all the evidence and testimony," *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 120-121; 274 NW2d 411 (1979), I cannot agree with the majority's conclusion that the trial court in this case "uncritically adopted" the agency rates or that agency rates were "the sole basis for the award of benefits in these circumstances." *Ante* at 276-277. As a result, I am not "left with the definite and firm conviction that a mistake has been made," *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008) (quotation marks and citation omitted), and, thus, in my view, the trial court did not clearly err on this issue.

III. CONCLUSION

In summary, I dissent from the majority's effort to extend the erroneous interpretation of MCL 500.3107 from *Griffith*. Specifically, I disagree with the majority's

judicially created requirements regarding what is necessary to show that a charge was incurred because those requirements are unsupported by the statutory language at issue and, thus, contrary to the Legislature's intent with regard to MCL 500.3107(1)(a). Moreover, the majority's decision to rely, at least in part, on the reasoning from *Bonkowski*, 281 Mich App 154, is ill conceived because *Bonkowski* is poorly reasoned, particularly in comparison to the persuasive analysis in *Hardrick*, 294 Mich App 651. Furthermore, *Bonkowski* is contrary to this Court's opinion in *Manley*, 425 Mich 140. Accordingly, I dissent.

MARILYN KELLY and HATHAWAY, JJ., concurred with CAVANAGH, J.

PEOPLE v GRISSOM

Docket No. 140147. Argued January 11, 2012 (Calendar No. 1). Decided July 31, 2012.

James E. Grissom was convicted in 2003 in the St. Clair Circuit Court of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and sentenced to 15 to 35 years in prison for raping a woman in a grocery store parking lot. The Court of Appeals, BORRELLO, P.J., and MURPHY and NEFF, JJ., affirmed in an unpublished opinion per curiam issued November 18, 2004 (Docket No. 251427), and the Supreme Court denied defendant's application for leave to appeal, 472 Mich 919 (2005). In 2006, defendant moved for relief from judgment and for a new trial on the basis of newly discovered police reports indicating that after the alleged assault, the complainant made a false allegation of kidnapping and a false allegation of rape, both of which she later recanted, and several other allegations of criminal sexual conduct that the complainant's father, husband, and friend told the police they believed were also false. The court, Peter E. Deegan, J., denied the motion, and the Court of Appeals denied defendant's application for leave to appeal. The Supreme Court, however, remanded the case to the Court of Appeals to consider whether defendant had a reasonably likely chance of acquittal in light of both the newly discovered evidence and the evidence presented against him at trial that did not involve the complainant's credibility. 480 Mich 1140 (2008). The Court of Appeals, BORRELLO, P.J., and DAVIS, J. (GLEICHER, J., dissenting), affirmed in an unpublished opinion per curiam issued October 29, 2009 (Docket No. 274148), holding that the newly discovered evidence did not provide grounds for a new trial because, even if it had been admissible, it was only impeachment evidence and it would not have made a different result probable on retrial. The Supreme Court granted defendant's application for leave to appeal. 488 Mich 1031 (2011).

In an opinion by Justice MARILYN KELLY, joined by Justices CAVANAGH, MARKMAN, and HATHAWAY, the Supreme Court *held*:

Newly discovered impeachment evidence may be grounds for granting a new trial if it satisfies the four-part test set forth in *People v Cress*, 468 Mich 678 (2003), and if there is a material,

exculpatory connection between the newly discovered evidence and the witness's testimony presented at trial and a different result is probable on retrial. The newly discovered impeachment evidence may be of a general character and need not contradict specific trial testimony in order to form the basis for granting a new trial.

1. Under *Cress*, a new trial may be granted because of newly discovered evidence if the evidence itself and not merely its materiality was newly discovered, the evidence was not cumulative, the party presenting the evidence could not have discovered and produced it at trial using reasonable diligence, and the evidence makes a different result probable on retrial. While ordinarily a new trial will not be granted because of newly discovered evidence that is offered to impeach a witness, Michigan and federal cases have made an exception for cases in which the evidence is sufficiently important to the determination of guilt or innocence that it could change the result on retrial. Newly discovered impeachment evidence satisfies *Cress* when there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and a different result is probable on retrial. The newly discovered impeachment evidence may be of a general character and need not contradict specific trial testimony in order to form the basis for granting a new trial. Accordingly, the trial court abused its discretion by denying defendant's motion for relief from the judgment on the ground that impeachment evidence cannot form the basis for granting a new trial.

2. To the extent that any Michigan decisions impose a per se prohibition against granting a new trial in light of newly discovered impeachment evidence, they were overruled.

3. The prosecution conceded that the evidence at issue in this case was newly discovered, not cumulative, and that defendant could not have discovered and produced it at trial using reasonable diligence. On remand, the trial court must evaluate the new evidence and determine whether there exists an exculpatory connection between it and the heart of the complainant's testimony. The only facts that the trial court should consider in deciding whether to grant a new trial are those in the newly discovered evidence and those in the record.

Court of Appeals' judgment vacated; case remanded to the trial court to evaluate whether the newly discovered evidence satisfies *Cress*.

Justice MARILYN KELLY, concurring, wrote separately to state that she would have vacated defendant's convictions and re-

manded the case for a new trial because the newly discovered evidence constituted material, exculpatory evidence that would make a different result probable on retrial. She would have decided that a material exculpatory connection exists between the newly discovered evidence and the complainant's testimony. Justice KELLY would have decided that a different result was probable on retrial and established precedent on the question of when newly discovered impeachment evidence can satisfy the fourth *Cress* factor because the issue was thoroughly briefed, the Supreme Court has already considered and remanded the case once, the case has been unresolved for six years, and the judge who will consider the case on remand will not have superior knowledge of the facts that were presented at trial given that the trial judge has since retired.

Justice MARKMAN, concurring, wrote separately to clarify that he did not join Justice MARILYN KELLY's concurrence or the dissenting opinion because he was less certain than those opinions regarding the proper resolution of the case given that, while there was evidence suggesting defendant's guilt, it was not clear that his guilt could have been established on the almost exclusive basis of the complainant's testimony had the newly discovered evidence been available to the jury. He also provided a summary of both the existing and the newly discovered evidence that the trial court could consider on remand.

Justice ZAHRA, joined by Chief Justice YOUNG and Justice MARY BETH KELLY, concurring in part and dissenting in part, agreed with the majority that the *Cress* test must be applied to determine whether a defendant is entitled to a new trial and that newly discovered impeachment evidence may in rare cases be grounds for a new trial if it satisfies the *Cress* test. He agreed that a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial, but disagreed that the evidence may be of a general character and need not contradict specific trial testimony. Moreover, he would have affirmed in this case, stating that the new evidence offered to impeach the complainant did not contradict any of her trial testimony or address the events in this case and that defendant's convictions did not hinge on the complainant's uncorroborated account of events given the substantial independent evidence that defendant had raped her. He would have held that new impeachment evidence could make a different result probable on retrial only if it directly contradicted material trial testimony in a manner that tended to exculpate the defendant.

CRIMINAL LAW — EVIDENCE — NEWLY DISCOVERED EVIDENCE — IMPEACHMENT — NEW TRIAL.

Newly discovered impeachment evidence may be grounds for a new trial if (1) the evidence itself and not merely its materiality was newly discovered, (2) it was not cumulative, (3) it could not have been discovered and produced at trial using reasonable diligence, (4) it makes a different result probable on retrial, and (5) there is a material, exculpatory connection between it and the witness's trial testimony; this connection may be of a general character and need not contradict specific testimony at trial.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Timothy K. Morris* and *Mona S. Armstrong*, Assistant Prosecuting Attorneys, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

Amicus Curiae:

Foley & Lardner LLP (by *Raymond J. Carey*, *Brandi F. Walkowiak*, *Erin Toomey*, and *Adam J. Wienner*) for the Innocence Network.

MARILYN KELLY, J. This case presents the question whether newly discovered impeachment evidence can constitute grounds for a new trial and, if so, under what circumstances. Defendant seeks a retrial on the basis of the newly discovered impeachment evidence. The trial court and the Court of Appeals concluded that this evidence cannot be used as a basis for granting a new trial because, in part, it is impeachment evidence. The Court of Appeals also concluded that the evidence did not warrant a new trial because if it were admitted on retrial, there was no reasonable chance of a different result.

We hold that impeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth

in *People v Cress*.[1] We further hold that a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial. It may be of a general character and need not contradict specific testimony at trial. Also, the evidence must make a different result probable on retrial. Accordingly, we vacate the Court of Appeals' judgment and remand this case to the trial court for determination of whether the newly discovered evidence satisfies *Cress*.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. THE COMPLAINANT'S STORY AND DEFENDANT'S CONVICTIONS

This case involves an alleged rape that occurred in 2001. The complainant testified that on May 12, 2001, she drove her van into the parking lot of the Fort Gratiot Meijer store between noon and 12:30 p.m. She claimed that she stepped out and turned to retrieve her purse from between the front seats. While she did so, a man with long dirty hair, a scraggly beard, and a hat appeared in front of the open door. He grabbed her arm and ordered her into the van. She testified that she resisted him, but the man struck her, causing her to fall inside. She continued to resist, but after being struck again, briefly lost consciousness.

When she regained her senses, her head was between the front seats, one of her legs was pinned by the man, and the other was pinned by the steering wheel. The man unbuttoned her pants and pulled them and her underwear down around her knees. He then unzipped his own pants and she saw his erect penis. The man again struck her several times with his hand and stated, "This will shut you up." He slid a ring with several

[1] *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003).

stones on it down one of his fingers to the knuckle and, she testified, forced that finger into her vagina.

The complainant claimed that she attempted to scream but could not because, after the man struck her, she was having difficulty breathing. However, she was able to call the man a "bastard" and he responded by backhanding her. The complainant indicated that she could taste blood from a cut on her face. She claimed that the man then inserted his penis into her vagina while gripping and striking her thighs as she continued to resist. The complainant testified that she again lost consciousness, but when she revived, her attacker was gone. She claimed that she found her way home, but was unable to recall the details of how she got there. When she arrived home, she immediately went into her bedroom because she did not want her children to know what had happened.

The complainant's husband testified that he knew that something was wrong when she returned home. He claimed that the complainant looked panicked and had a cut on her mouth. He questioned her about what had happened, and the complainant indicated in an incoherent and rambling manner that she had been physically attacked. However, she did not mention having been sexually assaulted. She testified that she did not tell her husband about the sexual assault because she "wasn't ready to face [her]self" and "didn't know how to break [her husband's] heart." The complainant's husband testified that he noticed large bruises developing on her legs and arms over the days following the attack.

On May 14, 2001, two days following the attack, the complainant reported the assault to the police. Again, she did not report its sexual nature and the police treated the incident as an attempted carjacking. However, the police did note a large scratch on the complain-

ant's face and that she told them she had extensive bruising. The complainant testified that she did not report the extent of the attack to the police because she had not yet fully disclosed the details of the assault to her husband.

Also on May 14, 2001, the complainant received medical treatment from Dr. Paul Jerry for some of her injuries. Jerry testified that he observed that the complainant's arm was swollen and bruised and that she reported tenderness in her neck. She testified that she did not report the sexual assault to Jerry because she was uncomfortable talking to him near other beds. She said she did not think reporting it would be helpful given that she had since showered.

On May 15, 2001, the complainant told someone for the first time that she had been sexually assaulted. The friend she spoke to described her as traumatized and advised her to disclose the sexual nature of the assault to her husband. The complainant thereafter told her husband that she had been digitally penetrated. However, she claimed that she did not disclose further details because of his reaction.

On May 16, 2001, the complainant was seen by Dr. Deborah Russell, her gynecologist. She reported the full account of the attack, including the penile penetration. She explained that because her attacker had not worn a condom, she was concerned about possible health-related issues. Russell directed the complainant to return to the hospital emergency room because doctors there would be better able to treat her for a sexual assault.

On Russell's advice, the complainant returned to the hospital along with her husband. She was treated by Dr. Thabit Bahhur. Because her husband was present and she had not yet told him the nature of the assault, she told

Bahhur only that she had been digitally penetrated. Bahhur observed abrasions on the outside and inside of the complainant's vagina, as well as on her cervix. He testified that the abrasions were consistent with forceful digital or penile penetration but he could not rule out other causes of the injuries. He did not collect evidence for a "rape kit" because of how much time had elapsed since the alleged attack. Also, the complainant had changed clothes and reported only a digital penetration. Additionally, the complainant had thrown away all the clothing she had worn during the alleged assault before it could be tested. She admitted that she knew at the time that it could have been tested for DNA evidence.

One week later, on May 23, 2001, the complainant returned to Russell for a follow-up examination that revealed bruising on her legs and arm, as well as abrasions along her inner labia. Russell opined that the complainant's vaginal area was normal at the time, but noted that the "vaginal area heals very quickly," so any abrasions more than a few days old would have healed.

Several months elapsed before the complainant told her husband the full account of her alleged assault.

Thirteen months after the alleged rape, in June 2002, the complainant reported to the police that she was driving near the Fort Gratiot Meijer when she saw a black Jeep leave a driveway. While it was behind her stopped at a traffic light, she said that she recognized the person she believed to be her assailant in her rearview mirror. She indicated that the driver had scraggly hair, a beard, and a ring on his hand. It was then that she notified the police for the first time that she had been sexually assaulted. She did this, she claimed, because she did not want to live in fear and believed that she might be able to "get the person off the street who hurt [her] . . . ."

Over a five-day period in October 2002, the complainant reviewed more than 7,500 photographs at the police station. She identified her attacker in one picture. That person was defendant. Sometime afterward, police officers interviewed defendant. He initially denied owning a ring like the one described by the complainant, although he later admitted that he had owned such a ring but had pawned it.

On November 7, 2002, the police arranged a corporeal lineup at which the complainant was given an opportunity to identify her assailant. Police officers advised defendant at his home that he should be at the station at a certain time. When they did so, defendant looked unkempt, with long hair and a scraggly beard. But when he arrived for the lineup, he had shaved his head and face. The complainant did not identify defendant as her attacker, instead selecting a different person from the lineup. Nonetheless, defendant was charged with two counts of criminal sexual conduct involving the use of force or coercion and resulting in personal injury to the victim.[2]

Several months before trial, the complainant claimed to have remembered that her attacker had a skull tattoo on his upper arm, although she did not recall any other details about it. Nor had she recalled the tattoo when the lineup was held or on any other occasion. Trial testimony established that defendant had a skull tattoo on his upper arm. There was also testimony that defendant had worked at the Fort Gratiot Meijer store on the day of the assault.

A St. Clair County deputy sheriff testified that the police never made a connection between defendant and a Jeep-type vehicle that the complainant asserted she

[2] MCL 750.520b(1)(f).

had seen him driving. Furthermore, testimony established that defendant had pawned a ring in May 2001. That was more than a year before the victim reported seeing a man in a black Jeep wearing a ring that she claimed she could positively identify.

Defendant did not testify at trial. A jury convicted him as charged of two counts of first-degree criminal sexual conduct. He was sentenced to 15 to 35 years in prison. On direct appeal, the Court of Appeals affirmed his convictions.[3] We denied his application for leave to appeal.[4]

B. THE NEWLY DISCOVERED EVIDENCE

Two years after defendant's convictions, the complainant called one of the detectives who had investigated the case against defendant. She informed him that she had been sexually assaulted by her brother and her father when she was a child. Another officer spoke with the complainant, who then reported having been raped in California. The prosecutor then obtained police reports from Bakersfield and Fresno, California, and provided them to defendant.

1. THE BAKERSFIELD, CALIFORNIA POLICE REPORTS

The first report, dated September 28, 2001, included a missing-persons form that the complainant's mother had filed with the Bakersfield police. The form indicated that the complainant had been having lunch at a restaurant with her mother and a friend when her cellular telephone rang. She left the restaurant with her phone but never returned. According to the officer who

[3] *People v Grissom*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 251427) (*Grissom I*).

[4] *People v Grissom*, 472 Mich 919 (2005).

completed the form, L. Lerman, the complainant's mother said that it was " 'out of character' " for the complainant to "just take off." She also told the police that the complainant had been raped several months earlier and since then had "not been herself."

The report also included a claim that the Bakersfield police received from the complainant's father the following day. Her father indicated that the complainant had recently called him and "told him she had been kidnaped and he needed to call the police." The police went to the father's house and asked him if he believed his daughter. He replied: " 'No. I'm afraid it's just a smoke screen. My daughter likes to have a lot of attention.' " The father also told the police that the complainant had been sexually assaulted between the ages of 10 and 12 by a female member of their church congregation. He further stated that "the police were never contacted, a report was never made, and [the complainant] never received any type of counseling."

The Bakersfield police determined that the complainant had not been kidnapped, but instead had been staying with friends in Fresno, California. Officers contacted one of her friends, who indicated that the complainant "had been raped several times and 'her husband was in on it.' " The friend also explained that the complainant had been "hiding out in Colorado earlier this week, where she was assaulted by her brother." Finally, the friend noted that the complainant had alleged that her brother raped her.

The Bakersfield police reports also reflect that the complainant admitted that she had called her father to report that she had been kidnapped. She told Lerman that she had been kidnapped by a "white male adult, late 20's, 5'9", 200 pounds, with black, curly, medium length hair, light complexion, mustache, wearing black pants and a

white and blue striped shirt." Lerman indicated that the complainant claimed that the man had taken her to "a concrete block room where there were no lights or windows" and forced her to swallow six large white pills at knifepoint. Lerman also noted that the complainant "later recanted this version of the incident, stating it never occurred," and that her friends from Fresno had picked her up at the restaurant where she had been lunching with her mother and a friend.

Another Bakersfield police investigation "revealed a possible assault had taken place against [the complainant], as she had some injuries consistent with a sexual assault." Lerman again interviewed the complainant, who claimed that she had been accosted by "a white male adult, with short, black hair, wearing a green and gray mask, which covered his mouth, chin and nose; dirty jeans; and a short-sleeve shirt with the sleeves rolled up." The complainant further claimed that the man had raped her "between two cars parked in the parking lot" of the restaurant and that she had been sexually assaulted at a Colorado motel while traveling to California. However, Lerman noted that the complainant provided no details regarding the assault and was "very uncooperative." She also refused to submit to a sexual-assault examination at a hospital.

The complainant also told Lerman that the 15-minute attack had occurred while she was outside the restaurant before entering and eating with her family. Lerman asked the complainant's mother if her daughter had appeared to be upset while they were having lunch, and her mother said that her daughter seemed fine. Lerman asked a colleague if he believed the complainant needed "psychiatric evaluation."

Lerman later contacted one of the complainant's friends in Fresno. The friend explained that she had

picked up the complainant at the restaurant on the day of the complainant's disappearance. The friend also indicated that the complainant "made no mention of a sexual assault at that time." When Lerman told the friend that the complainant had alleged that she had been kidnapped, taken to an unknown location, and given pills, the friend said: "That is not true. That is so untrue. That never happened." When Lerman asked her why she believed the complainant would tell Lerman such a thing, the friend stated, "I have no idea."

The second Bakersfield police report, dated October 1, 2001, indicated that on the previous day, the complainant appeared at an emergency room in a California hospital and announced that she had been raped. Bakersfield Police Officer A. Gavin talked with her at the hospital. She told him that she had been accosted by

> a Hispanic male, late 20's to early 30's, 5'6", 180 pounds, medium build, with black, curly hair, short in front and long in back, last seen wearing a green plastic, surgical type mask over his face, a light blue work shirt with no emblem on it, with the sleeves rolled up, dirty in appearance, dirty blue jeans and dirty tennis shoes.

Gavin's report further stated:

> [The complainant] said when they reached the south parking lot of the restaurant, she saw two vans parked next to each other. The suspect then pushed her in between these two vans. She said the suspect was wearing a small, hand-held, gray flashlight hooked on his belt with some type of leather strap. [The complainant] said he removed the flashlight from his belt with his right hand, reached down the front of her pants, and moved her underwear aside. He then inserted the flashlight into her vagina. I asked [the complainant] what she was wearing when this occurred and she told me it was the same clothing she was currently wearing. She told me she had not changed clothing since the incident occurred. I asked [the complainant] if she had showered or douched and she said she

had taken one shower since the incident. I asked [the complainant] if the suspect said anything to her when he was putting the flashlight into her vagina and she said he never said anything. She said he did this for a few seconds and he then removed the flashlight and inserted one of his fingers inside her vagina.

[The complainant] said she began screaming and the suspect yelled at her to stop screaming. She said he undid his pants and exposed his erect penis. He was able to move her pants and underwear aside and insert his penis into her vagina. [The complainant] said she began hitting him and he put his hands on her thighs and tried to keep her from squirming around. She said she screamed again and the suspect ran south through the parking lot toward the businesses located south of the restaurant. She never saw a vehicle. [The complainant] said the suspect did not ejaculate inside her vagina.

[The complainant] said she does not believe she could identify the suspect again if she were to see him again because he was wearing some type of mask over his face. She described this mask as green and said it reminded her of a mask a gardener or doctor might wear.

I asked [the complainant] what happened after the suspect fled and she said she retrieved her purse from the sidewalk in front of the restaurant where she had dropped it. She then went back inside the business and sat with her mother and two aunts and acted like nothing happened. [The complainant] said she ordered a cup of tea and sat silently while the three others conversed. I asked her why she did not say anything to her family and she said she was in shock. I asked [the complainant] if her family members would find it odd that they had made lunch arrangements, but she had not ordered any lunch and sat silently while the other three women socialized. She said that was typical behavior for her.

I asked [the complainant] why she was afraid to tell her family, the police, or anyone else about the incident in the parking lot. She told me she was afraid no one would believe her because this had happened once before. She told me approximately six months ago, while in Michigan, she

> had been raped in the parking lot of a grocery store while getting out of her vehicle. [The complainant] said she was in shock and could not believe it had happened again.

The complainant also told Gavin that she had met her Fresno friend through an online rape support group. She explained that she had joined the group *before* being raped in Michigan because she had been "raped when she was six years old." She further explained that she had been "in and out of support groups and therapy for years." However, Gavin's report noted that the complainant's husband expressed "a difficult time believing [the complainant] was telling the truth."

2. THE FRESNO, CALIFORNIA POLICE REPORT

The third and final report was made by the Fresno Police Department. That report stemmed from a friend expressing concern about the complainant's allegations. The friend stated that the complainant was "possibl[y] mentally unstable and may try to file false allegations . . . ." The report also reflected that the complainant had met one of her Fresno friends "about 18 months ago online and has been talking to her online and on the phone since then." It further stated:

> [The complainant], who is from an unknown city in Michigan, claims that approximately 18 months ago, her brother and his friends gang-raped her. She reported this crime and the suspects were arrested and convicted.
>
> She states that her brother got out of jail a week ago and found her in Colorado, where she was staying with her husband to hide from her brother. [The complainant] told [a friend] that her brother raped her again on Monday and was not supposed to know where she and her husband were.

The Fresno police officer who completed this report believed that the complainant had lied to her Fresno

friends, her family, and law enforcement. The report concluded that "[the complainant] told her family and Bakersfield [Police Department] she was being held against her will in Fresno, which was not true. [The complainant] is possibly mentally unstable."

C. PROCEDURAL HISTORY OF THIS APPEAL

Armed with these newly discovered police reports, in March 2006 defendant filed a pro se motion for relief from the judgment and requesting a new trial. The trial court denied the motion. The court acknowledged that the newly discovered evidence would have been admissible at trial to test the complainant's credibility. But the court concluded that it was bound by several Court of Appeals decisions holding that newly discovered impeachment evidence cannot be the basis for granting a new trial.

The Court of Appeals denied defendant's application for leave to appeal.[5] We remanded the case to the Court of Appeals for consideration as on leave granted, directing it "to consider whether defendant has a reasonably likely chance of acquittal in light of the newly discovered evidence and in light of the evidence presented against defendant that did not involve the complainant's credibility."[6]

On remand, the Court of Appeals majority held that newly discovered evidence cannot form the basis for granting a new trial if its sole purpose is to impeach a witness's credibility.[7] It also held that, even if the newly

[5] *People v Grissom*, unpublished order of the Court of Appeals, issued July 2, 2007 (Docket No. 274148).

[6] *People v Grissom*, 480 Mich 1140 (2008).

[7] *People v Grissom*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2009 (Docket No. 274148), p 10 (*Grissom II*). The Court of Appeals majority cited *People v Duncan*, 414 Mich 877

discovered evidence were admissible and could have provided a basis for granting a new trial, defendant had no reasonable chance of acquittal.[8] It opined that there was other evidence supporting defendant's conviction that was not dependent on the complainant's credibility.[9] Therefore, the Court affirmed the trial court's denial of defendant's motion for relief from the judgment.

Judge GLEICHER dissented. She opined that defendant was reasonably likely to be acquitted on retrial in light of the newly discovered evidence.[10]

We granted defendant's application for leave to appeal.[11]

II. ANALYSIS

We review for an abuse of discretion a trial court's decision to grant or deny a motion for new trial.[12]

A. LEGAL BACKGROUND

Historically, Michigan courts have been reluctant to grant new trials on the basis of newly discovered evidence.[13] This policy is consistent with requiring parties to " 'use care, diligence, and vigilance in securing and presenting evidence.' "[14] We have identified

(1982), and *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993), for the proposition that newly discovered impeachment evidence cannot be the basis for a new trial.

[8] *Grissom II*, unpub op at 11.

[9] *Id*.

[10] *Id*. at 15 (GLEICHER, J., dissenting).

[11] *People v Grissom*, 488 Mich 1031 (2011).

[12] *People v Andrews*, 360 Mich 572, 578; 104 NW2d 199 (1960).

[13] See, e.g., *People v Pizzino*, 313 Mich 97, 109; 20 NW2d 824 (1945), citing *Canfield v City of Jackson*, 112 Mich 120, 123; 70 NW 444 (1897).

[14] *Pizzino*, 313 Mich at 109, quoting *Canfield*, 112 Mich at 123 (citations and quotation marks omitted).

several evaluative criteria to apply when determining whether a new trial may be granted because of newly discovered evidence. We have explained that a defendant must show that

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.[15]

This test has been applied consistently for more than a century.[16]

In *Spray v Ayotte*, the Court added a caveat to the four-part test in the context of newly discovered *impeachment* evidence, noting that "[o]rdinarily a new trial will not be granted because of newly discovered evidence to impeach a witness."[17] Like the traditional four-part test, *Spray*'s caveat has also endured since its inception.[18]

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[15] *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations and quotation marks omitted).

[16] See, e.g., *People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961); *Canfield*, 112 Mich at 123.

[17] *Spray v Ayotte*, 161 Mich 593, 595; 126 NW 530 (1910).

[18] See, e.g., *Luckhurst v Schroeder*, 183 Mich 487, 499-500; 149 NW 1009 (1914) ("Ordinarily, the court will not grant a new trial on the ground of newly discovered evidence where that evidence is for the purpose of impeachment."), citing *Spray*, 161 Mich at 593-595; *People v Serra*, 301 Mich 124, 133; 3 NW2d 35 (1942) ("A new trial will not ordinarily be granted because of newly-discovered evidence to impeach a witness."), citing *Spray*, 161 Mich 593; see also *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977) ("Generally, too, where the new evidence is useful only to impeach a witness, it is deemed merely cumulative."). Thus, if merely cumulative, newly discovered evidence would not satisfy the four-part test for granting a new trial. Nonetheless, *Barbara* noted that new impeachment evidence was "particularly significant when . . . the only evidence that an offense was ever committed was

Recently, in *People v Armstrong*, we reconsidered the significance of impeachment evidence and its use as grounds for granting a new trial.[19] We concluded that a defense attorney's failure to introduce telephone records that contradicted the complainant's trial testimony amounted to ineffective assistance of counsel and was sufficient for a new trial. We specifically noted the importance of evidence attacking the complainant's credibility because "[t]he defense's whole theory of the case was that the complainant had falsely accused defendant of rape. The attacks on the complainant's credibility at trial were inconclusive, providing mere 'he said, she said' testimony contradicting the complainant's version of the events."[20] Thus, the impeachment evidence was found to be sufficiently important to the determination of guilt or innocence that it could change the result on retrial. In these circumstances, we held that a defendant might be entitled to a new trial.

Federal courts have employed an approach similar to Michigan's with respect to newly discovered impeachment evidence. For example, the United States Court of Appeals for the Seventh Circuit has opined, "Of course it will be the rare case in which impeaching evidence warrants a new trial, because ordinarily such evidence will cast doubt at most on the testimony of only one of the witnesses."[21] Yet the Seventh Circuit recognized that merely because

> [t]he practice has been to deny new trials where the only newly discovered evidence was impeaching[,] . . . the practice should not be taken to imply *a rule* that even if the

largely based on the testimony of individuals whose credibility might be put into question by these new witnesses." *Barbara*, 400 Mich at 363-364.

[19] *People v Armstrong*, 490 Mich 281; 806 NW2d 676 (2011).

[20] *Id*. at 291.

[21] *United States v Taglia*, 922 F2d 413, 415 (CA 7, 1991).

> defendant proves that his conviction almost certainly rests on a lie, the [trial] judge is helpless to grant a new trial."[22]

The Court further noted that

> [i]f the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he *had lied consistently in a string of previous cases*, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted.[23]

Thus, newly discovered evidence that impeaches a witness's testimony with false statements made in other cases is expressly permitted under *Taglia*.

Likewise, the United States Court of Appeals for the Third Circuit has held that "[trial] courts do not and should not ignore a claim that there has been a miscarriage of justice just because the newly discovered evidence supporting the claim could be categorized as impeachment in character."[24] Rather, "[w]hen asked to grant a new trial solely on the basis of new impeachment evidence, a court carefully should examine whether the defendant has demonstrated the necessary exculpatory connection between the evidence and the offense or has demonstrated that the newly discovered evidence totally undermined critical inculpatory evidence."[25] In evaluating this evidence, the Third Circuit noted that "[t]here must be something more, i.e. a factual link between the heart of the witness's testimony at trial and the new evidence. This link must suggest directly that the defendant was convicted

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[22] *Id*. (emphasis added).

[23] *Id*. (emphasis added).

[24] *United States v Quiles*, 618 F3d 383, 391 (CA 3, 2010).

[25] *Id*. at 392.

wrongly."[26] Other circuits and authorities have reached similar conclusions.[27]

And in *White v Coplan*,[28] the United States Court of Appeals for the First Circuit explicitly rejected the notion that impeachment evidence lacks the power to alter a jury verdict. It held:

> In this case, [the defendant's] evidence was not merely "general" credibility evidence. That label applies to the traditional proofs—offered through character or reputation witnesses and sometimes through proof of specific instances of misbehavior, especially prior convictions—to support an inference that the witness has a tendency to lie. Once a staple of trials, modern evidence rules . . . have significantly restricted such evidence without totally precluding it in all cases.
>
> The evidence in this case was considerably more powerful. The past accusations were about sexual assaults, not lies on other subjects; and while sexual assaults may have some generic similarity, here the past accusations by the [witnesses] bore a close resemblance to [their] present testimony—in one case markedly so. In this regard the evidence of prior allegations is unusual.
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> If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character). The strength of

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[26] *Id*.

[27] See, e.g., *United States v Davis*, 960 F2d 820, 825 (CA 9, 1992) ("[N]ewly-discovered impeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness' testimony totally incredible."). *Davis* allowed the introduction of impeachment evidence that was entirely immaterial to the witness's testimony at trial. As an example of newly discovered evidence that would warrant granting a new trial, *Davis* stated, "If newly-discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the interest of justice would support a new trial." *Davis*, 960 F2d at 825 (quotation marks omitted).

[28] *White v Coplan*, 399 F3d 18 (CA 1, 2005).

> impeachment evidence falls along a continuum. That a defendant told lies to his teacher in grade school is at one end; that the witness was bribed for his court testimony is at another. Many jurors would regard a set of similar past charges by the [witnesses], if shown to be false, as very potent proof in [the defendant's] favor.
>
> This "if," of course, is the heart of the matter. If the witness were prepared to admit on the stand that a prior accusation of similar nature was false, it is hard to imagine good reason for excluding the evidence. Prior admitted lies of the same kind in similar circumstances could powerfully discredit the witness. No time-consuming excursion beyond the witness would be required. Further, the accusation being conceded to be untrue, inquiry would not require the witness to admit to prior sexual activity or assault.[29]

White's analysis stands as strong recognition of the utility of impeachment evidence in the context of prior false accusations. The newly discovered evidence in that case did not directly contradict the witnesses' testimony at trial. It was nonetheless held sufficient to warrant a new trial because it significantly undermined the victims' credibility on the question of whether the crime ever occurred.

Finally, the United States Supreme Court has recognized the significance of newly discovered impeachment evidence. In *Napue v Illinois*, the Court stated that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[30]

It bears emphasizing that, as this Court recognized more than a century ago, newly discovered impeach-

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[29] *Id*. at 24-25.

[30] *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959).

ment evidence ordinarily will not justify the grant of a new trial. Our decision today, therefore, does not disturb this unremarkable statement. It will be the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial.[31] But when that rare case presents itself, a court should not refuse to grant a new trial solely on the ground that the newly discovered evidence is impeachment evidence. It should not refuse even if the new evidence is not directly contradictory to specific trial testimony.[32]

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[31] See *Quiles*, 618 F3d at 392.

[32] The dissent relies on *Spray* and 29 Mack, Cyclopedia of Law & Procedure, pp 918-921, for the proposition that "newly discovered evidence that contradicts particular and material statements in a witness's testimony could potentially satisfy [the *Cress*] factors for granting a new trial, as opposed to newly discovered evidence that only serves to impeach a witness's credibility." *Post* at 347. This misstates *Spray*'s holding. *Spray* stands only for the uncontroversial proposition that, generally, a new trial will not be granted because of newly discovered impeachment evidence.

Nor does the Cyclopedia of Law & Procedure support the limitation the dissent places on newly discovered impeachment evidence. The treatise makes no reference to a need for the evidence to specifically contradict particular statements. The treatise states that "[n]ewly discovered evidence to successfully contradict a witness upon a material matter may be cause for allowing a new trial, and it is no objection to such allowance that the evidence may incidentally impeach a witness." Our holding is entirely consistent with this statement. Accordingly, the entire basis for the dissent's conclusion that the newly discovered evidence does not make a different result probable on retrial is based on a flawed and baseless assumption: that this evidence must contradict a particular statement in a witness's testimony. It is telling that the prosecution conceded in its brief to this Court that "neither this Court nor the Court of Appeals has ever indicated that the entire entry from the Cyclopedia has been incorporated into Michigan law." In any event, the dissent judicially engrafts the word "particular" onto the passage quoted from the treatise and, in doing so, gives the 100-year-old passage a meaning its authors never imagined.

In sum, there is ample authority that undercuts the Court of Appeals' conclusion that newly discovered impeachment evidence can never be grounds for a new trial. Rather, impeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in *Cress*. More specifically, newly discovered impeachment evidence satisfies *Cress* when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence[33] and (2) a different result is probable on retrial.[34]

The Court of Appeals majority in this case relied on *People v Duncan*[35] and *People v Davis*[36] for the proposition that newly discovered impeachment evidence is never grounds for a new trial. *Duncan* was a mere peremptory order of this Court. The Court of Appeals dissenting opinion whose reasoning this Court adopted in *Duncan* did not impose a blanket prohibition on granting a new trial because of newly discovered impeachment evidence.[37]

Davis's alleged prohibition of new trials based on newly discovered impeachment evidence can be traced

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In sum, there is no precedent, in Michigan or elsewhere, recognizing such a limited utility for newly discovered impeachment evidence. The dissent has no authority for its claim that newly discovered impeachment evidence can be considered only if it directly contradicts a particular statement in a witness's testimony.

[33] See *Quiles*, 618 F3d at 392.

[34] See *Cress*, 468 Mich at 692. The prosecution contends that for newly discovered impeachment evidence to satisfy *Cress*, it must directly contradict a witness's testimony at trial. We disagree. There is no precedent in Michigan for such a narrow interpretation of the proper scope of newly discovered impeachment evidence.

[35] *Duncan*, 414 Mich 877.

[36] *Davis*, 199 Mich App at 516.

[37] See *People v Duncan*, 96 Mich App 614, 618-620; 293 NW2d 648 (1980) (R. B. BURNS, P.J., dissenting).

to the 1967 Court of Appeals decision in *Graham v Inskeep*.[38] Yet *Graham* employed language consistent with our rule today, noting that "it is *generally* held that a new trial will not be granted if the newly-discovered evidence is merely to impeach."[39] *Graham* left open the possibility that there may be circumstances under which newly discovered impeachment evidence warrants a new trial. Thus, *Graham*'s progeny transformed a *general* rule into a *per se* one. To the extent that any Michigan decisions impose a per se prohibition against granting a new trial in light of newly discovered impeachment evidence, they are hereby overruled.[40]

B. THE TRIAL COURT ABUSED ITS DISCRETION

As discussed earlier, granting a new trial on the basis of newly discovered evidence requires a defendant to show that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the newly discovered evidence is not cumulative, (3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial.

In this case, the prosecution did not contest the first three of these criteria in the lower courts. It conceded that the evidence was newly discovered, not cumulative, and that defendant could not have discovered and produced it at trial using reasonable diligence.[41]

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[38] *Graham v Inskeep*, 5 Mich App 514; 147 NW2d 436 (1967).

[39] *Id*. at 523 (emphasis added; quotation marks omitted).

[40] See, e.g., *People v Sharbnow*, 174 Mich App 94; 435 NW2d 772 (1989); *People v Snell*, 118 Mich App 750; 325 NW2d 563 (1982).

[41] The prosecution argues before this Court for the first time that defendant's newly discovered evidence is merely cumulative and thus does not satisfy the four-part test. This issue is unpreserved, but in any event, it lacks merit. The newly discovered evidence is not cumulative

However, the trial court abused its discretion by denying defendant's motion for relief from the judgment. It ruled that impeachment evidence "cannot form the basis for . . . grant[ing] . . . a new trial." This ruling was legally incorrect. Accordingly, the trial court's ruling was necessarily an abuse of discretion.

On remand, defendant is entitled to have the trial court carefully consider the newly discovered evidence in light of the evidence presented at trial. The trial court must evaluate the new evidence and determine whether there exists an exculpatory connection between it and the heart of the complainant's testimony. The only facts that the trial court should consider in deciding whether to grant a new trial are those in the newly discovered evidence and those in the record.

III. CONCLUSION

We hold that newly discovered impeachment evidence generally is insufficient to warrant a new trial. However, such evidence may be grounds for a new trial if it satisfies the four-part test set forth in *Cress*. Newly discovered impeachment evidence concerning immaterial or collateral matters cannot satisfy *Cress*. But if it has an exculpatory connection to testimony concerning a material matter and a different result is probable, a new trial is warranted. It is not necessary that the evidence contradict specific testimony at trial. Because the trial court did not have the benefit of this clarification of the role of newly discovered impeachment evi-

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because at trial defendant did not impugn the complainant's credibility with evidence that she had made previous false rape accusations. Defendant was unable to present "evidence of the same kind to the same point" at trial. *Murray v Weber*, 92 Iowa 757, 758; 60 NW 492 (1894). Thus, the prosecution's initial concession was correct because defendant's newly discovered evidence is not cumulative.

dence, a remand for application of the standards clarified here is appropriate.

For these reasons, we reverse the Court of Appeals' judgment. We remand the case to the trial court for a determination of whether the newly discovered evidence satisfies *Cress*. The only facts that the trial court should consider in deciding whether to grant a new trial are those in the newly discovered evidence and those in the record. The trial court's determination is to be made and communicated to this Court within 60 days of the date of this opinion.

We retain jurisdiction.

CAVANAGH, MARKMAN, and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

MARILYN KELLY, J. (*concurring*). Although I am willing to agree to remand this case to the trial court for application and resolution of the *Cress* test, I believe this Court should do that itself. Hence, I write separately to explain why.

First, this appeal has lingered unresolved in the state appellate courts for the past six years. This Court already considered and remanded it once before during that period. The parties have now diligently, thoroughly, and thoughtfully briefed and argued the question whether defendant should be afforded a new trial. Not only is it appropriate for us to give them an answer, there is no impediment to our doing so.

Second, the rationale for a remand to the trial court rests in large part on the theory that the judge there has the benefit of having tried the case. The trial judge would normally have superior knowledge of the facts that were presented at trial. He or she would apply that knowledge to the question of whether a different result

is probable on retrial were the newly discovered evidence to be admitted. But in this case, the trial judge has retired from the bench, and this Court's remand will go to a judge who in all likelihood knows nothing of the facts of this case.

Third, in granting defendant's application for leave to appeal, we specifically ordered the parties to address whether the newly discovered evidence warrants a new trial. Hence, it follows that we should attempt to resolve the issue.

Lastly, by resolving the issue, the Court can establish precedent on the question of when newly discovered impeachment evidence can satisfy the fourth *Cress* factor.

Nonetheless, I fully join the majority opinion. I write separately to definitively answer the question on which we granted defendant's application for leave to appeal: I would hold that the newly discovered evidence constitutes material exculpatory evidence and that it makes a different result probable on retrial, satisfying the fourth *Cress* factor. Accordingly, my preference would be to vacate defendant's convictions and remand the case for a new trial.

I. ANALYSIS

As discussed in my majority opinion, granting a new trial on the basis of newly discovered evidence requires a defendant to show that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the newly discovered evidence is not cumulative, (3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial.[1] Because the

[1] *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

prosecution correctly conceded that defendant has satisfied the first three factors, the only remaining question is whether the newly discovered evidence makes a different result probable on retrial. I would answer that question in the affirmative.[2]

A. ADMISSIBILITY OF THE NEWLY DISCOVERED EVIDENCE

Merely presenting a court with newly discovered evidence does not automatically support the grant of a new trial. Rather, to potentially effect a different result on retrial and thereby satisfy the fourth *Cress* factor, the newly discovered evidence must be admissible. Thus, a question prefatory to the trial court's resolution of whether defendant's newly discovered evidence would make a different result probable on retrial is whether that evidence could be admissible. The Court of Appeals majority hinted that it could be admissible in limited circumstances, namely, to show that the complainant admitted she had lied about being kidnapped and about being raped in California. It also noted that the California police reports con-

[2] In *Graham v Inskeep*, 5 Mich App 514, 524; 147 NW2d 436 (1967), the Court of Appeals opined that trial courts are generally in the best position to determine whether newly discovered evidence would tend to produce a different result on retrial. *Graham* reasoned that trial courts are in closest contact with the parties. They have tried the case, have heard the relevant witnesses' testimony, and are therefore in the best position to evaluate the proper weight to be afforded newly discovered evidence. However, the judge who presided over defendant's trial and denied defendant's motion for relief from the judgment has retired. Thus, *Graham*'s reasoning has no applicability here. There is no legitimate reason to remand this case to the trial court for assignment to a new judge unfamiliar with its lengthy history, factual background, and legal intricacies. Thus, the dissent's claim that "[t]he trial court possesses a superior ability to assess in the first instance the strength and importance of the newly discovered evidence in relation to the evidence presented at trial," *post* at 363, is unfounded.

tain hearsay,[3] which is generally not admissible under MRE 802. I conclude that, at the very least, the reports have evidentiary value and contain information that could be admitted if properly presented.

First, on retrial, if the complainant were to deny having ever made a false police report of rape, the fact that she did so in California in 2001 could be admissible. Under MRE 613, this inconsistency would be relevant to her credibility. If she were to testify that she made the false report, it would also severely impeach her credibility. The veracity of her testimony was vital to defendant's convictions.

Second, the newly discovered evidence is relevant. In this regard, MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Accordingly, parts of the newly discovered evidence could be admissible to show that the complainant had a motive for falsely reporting a sexual assault. It could show that she engaged in a scheme consisting of falsely

[3] MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

accusing various individuals of raping her. The police reports show that the complainant reported to the police, family, or friends that she had been raped by at least eight different people on at least nine separate occasions.[4] Thus, MRE 404(b) could be yet another basis for the introduction of information contained in the California police reports.[5]

Third, the newly discovered evidence has evidentiary value because, on retrial, it may permit defendant access to the complainant's medical, counseling, and psychological records. This could include records from the online rape support group that the complainant participated in *before* the alleged rape by defendant in this case. The trial court denied defendant's motion for discovery of these records at trial, and the Court of Appeals affirmed this decision,[6] citing MCR 6.201(C)(2)[7]

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[4] These instances include (1) an alleged rape in Michigan when the complainant was 6 years old, (2) an alleged sexual assault by a female member of the complainant's church congregation when the complainant was between 10 and 12 years old, (3) alleged sexual assaults by the complainant's brother when she was a child, (4) alleged sexual assaults by the complainant's father when she was a child, (5) the alleged rape by defendant in this case, (6) alleged rapes in California that her husband and brother were "in on," (7) the alleged rape that occurred in a California parking lot, (8) the recanted allegation of rape at a Colorado hotel, and (9) an alleged gang rape committed by her brother and his friends.

[5] The dissent argues, *post* at 352 n 34, that I have developed an exculpatory defense theory that the complainant engaged in a "scheme" to make false rape accusations. Not so. I have simply explained why, under MRE 404(b), evidence of the complainant's admittedly false accusations, as well as the other alleged assaults unearthed in the California police reports, might be admissible as part of a scheme, pattern, or system of making those allegations. My analysis in this regard tracks the language of MRE 404(b).

[6] *People v Grissom*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 251427), p 4.

[7] MCR 6.201(C)(2) provides, "If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records."

and *People v Stanaway*.[8]

Stanaway requires a defendant to establish "a reasonable probability that the privileged records are likely to contain material information necessary to his defense" before an in camera review is conducted pursuant to MCR 6.201(C)(2) to ascertain whether those records contain evidence that is "reasonably necessary to the defense . . . ."[9] It appears that the newly discovered evidence could satisfy the court rule and *Stanaway*.[10]

The rape-shield statute[11] does not apply to this evidence because it does not preclude impeaching a complainant with the complainant's prior false accusation. The statute provides that evidence of specific instances of a complainant's sexual conduct, opinion evidence of a

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[8] *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994).

[9] *Id*. at 649, 684.

[10] *Stanaway* considered a situation in which "[t]he defense theory is that the claimant is a troubled, maladjusted [person] whose past trauma has caused her to make a false accusation . . . ." *Id*. at 682. The defendant asserted "a good-faith belief" and provided factual support for his in camera discovery motion that "the complainant suffered sexual abuse . . . before this allegation of abuse, the nonresolution of which produced a false accusation . . . ." *Id*. The Court concluded that in those circumstances, the defendant might have met the requisite standard for an in camera review. *Id*. at 683.

To be clear, I would not hold that the trial court *must* conduct an in camera review of the complainant's psychological records. Rather, consistently with *Stanaway* and MCR 6.201(C)(2), it *may* conduct a review if there is a reasonable probability that the privileged records are likely to contain information necessary to the defense.

Similarly, I do not rely on the complainant's psychological records in assessing whether defendant has met his burden of showing that a different result is probable on retrial. I simply note how the newly discovered evidence might make possible the admission of those records on remand.

[11] MCL 750.520j.

complainant's sexual conduct, and reputation evidence of a complainant's sexual conduct are generally inadmissible. However, in *People v Jackson*, we held that testimony concerning prior false sexual-assault allegations does not implicate the rape-shield statute.[12] And as the Court explained in *People v Hackett*,

> [t]he fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the *defendant should be permitted to show that the complainant has made false accusations of rape in the past*.[13]

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[12] *People v Jackson*, 477 Mich 1019 (2004).

[13] *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984) (emphasis added; citations omitted). The dispositive question regarding the timing of a past false rape accusation and its admissibility is not when a false rape allegation occurred relative to the case at bar. Rather, given a defendant's Sixth Amendment right to confrontation, it is sufficient that any prior false allegation occurred before a complainant testifies at trial. To hold otherwise would lead to unjust results.

Consider the following hypothetical situations. In the first situation, the complainant alleges that defendant A raped her. While the case against A is pending, the complainant makes other rape allegations against defendants B, C, and D. Then she recants her allegations against A, B, and C. It is undisputed that defendant D may cross-examine the complainant regarding her recanted allegations against A, B, and C.

Thus, at a minimum, on retrial, the rape-shield statute would not preclude admission of the complainant's admittedly false accusation of rape made to the Bakersfield Police.

In addition, *Hackett* discussed another type of evidence of sexual conduct that, if otherwise admissible, does not run afoul of the rape-shield statute: evidence of a complainant's sexual conduct probative of a complainant's ulterior motive for making a false charge.[14] This exception may also be germane because evidence of the complainant's past false accusation and purported childhood sexual abuse could arguably suggest an underlying motive for making a false charge.[15]

In light of these evidentiary, statutory, and judicially crafted rules, if defendant properly offered the evidence, he could introduce the complainant's prior false rape claim. Potentially, he could also attempt to show that she made numerous reports of rape over the years involving many different individuals. Finally, under *Stanaway* and MCR 2.601(C)(2), the newly discovered evidence might permit defendant access to the complainant's medical, counseling, and psychological

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In the second situation, the complainant alleges that defendant A raped her. While the case against A is pending, the complainant makes other rape allegations against defendants B, C, and D that she later recants. Under the dissent's erroneous view, defendant A would not be permitted to cross-examine the complainant regarding the false rape allegations against defendants B, C, and D. This would be because he was unfortunate enough to have been accused first. Such a result is untenable.

[14] *Id*.

[15] See *White v Coplan*, 399 F3d 18, 24 (CA 1, 2005) ("If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive . . . ."); see also *Stanaway*, 446 Mich at 682 (recognizing that a complainant's unresolved prior sexual abuse could produce a false accusation).

records on retrial, which were denied to him at trial. I note that this is not an exhaustive evaluation of the potential admissibility of the newly discovered evidence.[16]

B. EXCULPATORY CONNECTION

For newly discovered impeachment evidence to satisfy *Cress*, there must be an exculpatory connection between the evidence and the offense, even if the new evidence does not contradict a witness's specific testimony. Alternatively, the evidence must totally undermine critical inculpatory evidence.[17] Hence, in evaluating this issue, a court must identify a factual link

[16] Without *any* supporting analysis, consideration of our rules of evidence, or application of governing caselaw, the dissent states as an ipse dixit that the newly discovered evidence might not be admissible on retrial. By contrast, I have carefully outlined how at least portions of the newly discovered evidence could be admissible notwithstanding the fact that hearsay is involved.

Furthermore, the dissent claims that on remand, the trial court should consider only admissible evidence when determining whether the newly discovered evidence satisfies *Cress*. This is incorrect. MCR 6.507 provides that the parties may "expand the record by including any additional materials [the court] deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, [and] exhibits . . . ."

The dissent also indulges in considerable speculation about evidence the prosecution might seek to enter into the record on remand to defeat the grant of a new trial. I have avoided such speculation in part because it tends to lead the legal analysis far astray for no useful or appropriate purpose. And it is unavailing. For example, the dissent speculates that the prosecution may show that the complainant's false California assault claims were the product of post-traumatic stress disorder caused by defendant's alleged assault. But, of course, defendant might show that the complainant's claim against him in this case was the product of post-traumatic stress disorder caused by sexual assaults she suffered as a child.

[17] *United States v Quiles*, 618 F3d 383, 392 (CA 3, 2010).

between the heart of a key witness's testimony at trial and the newly discovered evidence. I would hold that a clear exculpatory connection exists between the newly discovered evidence in this case and the heart of the complainant's testimony at trial. This is because the new evidence calls into question whether the alleged crime she testified about ever occurred.

The new evidence impeaches complainant's most incriminating testimony. Defendant's convictions were predicated on complainant's allegation that defendant sexually assaulted her. Her credibility was central to the case. But the newly discovered evidence casts serious doubt on her credibility, not just in general, but with respect to the most crucial evidence at trial: her testimony that she was brutally assaulted in a commercial parking lot in the middle of the day and that defendant perpetrated the attack.

The newly discovered police reports are highly significant because they render complainant's allegations in this case more difficult to believe. Relevant in this respect is the final version of complainant's story documented in the California police reports, the details of which bear a remarkable resemblance to this case. Both involved allegations of rape in a parking lot in the middle of the day. In both cases, no one reported seeing an assault. In both cases, no definitive physical evidence of a sexual assault was obtained because complainant did not seek immediate medical treatment. And in both cases, the complainant alleged that her attacker penetrated her with a foreign object, his finger, and then his penis.

In sum, the newly discovered evidence creates a serious question about whether any sexual assault occurred at all in this case. It discloses a history of at least one, and as many as nine, prior false sexual-

assault allegations. And it raises questions about the complainant's veracity as pertains to her testimony inculpating defendant. As we noted in *People v Barbara*, new impeachment evidence is "particularly significant when . . . the only evidence that an offense was ever committed was largely based on the testimony of [an] individual[] whose credibility might be put into question . . . ."[18] For these reasons, I would hold that the newly discovered evidence contains an exculpatory connection, i.e. "a factual link between the heart of the [complainant's] testimony at trial and the new evidence . . . suggest[ing] directly that the defendant was convicted wrongly."[19]

C. A DIFFERENT RESULT IS PROBABLE ON RETRIAL

In light of these considerations, I believe that a different result is probable on retrial. First, the prosecution's case against defendant was not strong. Several months had elapsed from the date of the alleged rape by the time the complainant told her husband about it. Thirteen months elapsed before the complainant went to the police claiming that someone had raped her. Initially, she told both her husband and the police a different story—that she had been beaten. No direct physical evidence linked defendant to the crime. There was no DNA evidence and the complainant did not seek

[18] *People v Barbara*, 400 Mich 352, 363-364; 255 NW2d 171 (1977).

[19] *Quiles*, 618 F3d at 392. The dissent argues, *post* at 350, that "the reports do not contradict *any* evidence presented at trial, let alone *material* evidence" and that there is no exculpatory connection between the new evidence and the complainant's testimony at trial. This argument misses the point. The exculpatory connection between the new evidence in this case and the complainant's testimony at trial is that the new evidence tends to show defendant's innocence. It does that by showing that the crime the complainant accused him of might never have occurred.

medical care until any such evidence could no longer be identified. Indeed, although the complainant admitted that she knew the clothing she wore during the alleged attack could be tested for DNA evidence, she threw it away before it could be tested.

The complainant identified someone other than defendant as her assailant at the police lineup. She did not tell two of the physicians who examined her after the alleged attack that she had been raped. There were no eyewitnesses to the alleged attack, which supposedly occurred in broad daylight in a crowded parking lot. Surveillance videotape of the Meijer parking lot did not reveal any evidence of criminal activity. Nor did it reveal that defendant or the complainant was even *present* in the parking lot on the day of the alleged assault.[20]

Second, the only evidence offered to corroborate the complainant's allegation that she suffered physical injuries that could have been signs of a rape was testimony from Dr. Thabit Bahhur and Dr. Deborah Russell. These are two of the physicians who examined her. Bahhur indicated that he observed abrasions on the outside and inside of the complainant's vagina, as well as on her cervix. Although he testified that the abrasions were consistent with a sexual assault, he specifically indicated that he could not rule out other causes of the injuries.

Similarly, Russell observed abrasions on the complainant's labia. She also reported bruises on the com-

[20] The dissent reiterates the prosecution's explanation for why the surveillance tape does not corroborate the complainant's allegations. But it is based on utter conjecture. There was no evidence that defendant ever watched, much less studied, the Meijer store surveillance system. Similarly, the dissent reasons from only one premise: that the assault definitively occurred and that the details the complainant testified about were factual.

plainant's arms and legs. But Russell testified that the complainant's vaginal area was "normal" at the time of her exam. Thus, the testimony offered by Bahhur and Russell did not establish that the complainant had been sexually assaulted, much less that defendant was her attacker.

Third, during closing argument, the prosecutor presented the complainant's allegations as setting forth a slam-dunk case, stating, "There's really, really no question as to whether or not this assault happened. There's really no question." In light of the newly discovered evidence, this is not an accurate characterization of the complainant's allegations. The newly discovered evidence creates a serious question about whether any assault occurred at all in this case. Moreover, it discloses a history of at least one, and possibly as many as nine, false sexual-assault allegations. It raises questions about the complainant's veracity. I believe that at a new trial, it is probable that a jury would find this evidence sufficiently compelling to acquit defendant.

In reaching this conclusion, I do not overlook the evidence presented at trial corroborating defendant's convictions that was not entirely independent of the complainant's credibility. This evidence includes the fact that defendant worked at the Meijer store where the alleged assault occurred. It also includes the complainant's identification of defendant in a photo array. It includes defendant's lie to the police about not having owned or pawned a ring fitting the complainant's description of her attacker's ring.[21] And it includes the

[21] However, even this evidence raises questions about the complainant's veracity. The complainant testified that she observed someone who she thought was her assailant wearing the ring more than one year *after* defendant had pawned it. Thus, on retrial and in light of defendant's new evidence, a jury might find the complainant less credible if it believes that she was wrong about seeing defendant and the ring.

fact that defendant had a skull tattoo on his right arm. Furthermore, defendant altered his appearance before his corporeal lineup. However, given the circumstantial nature of this evidence, the likelihood that a jury would acquit defendant after being presented with the newly discovered evidence is great enough to warrant a new trial.

Given these considerations, I believe defendant has set forth a sufficient basis for a new trial. As we noted in *Barbara*, new impeachment evidence is "particularly significant when . . . the only evidence that an offense was ever committed was largely based on the testimony of [an] individual[] whose credibility might be put into question . . . ."[22] That is, I believe there is a factual link between the heart of the complainant's testimony at trial and the newly discovered evidence that suggests that defendant might have been wrongly convicted.[23] I cannot say that a different result will *certainly* occur on retrial. But the newly discovered evidence undermines my confidence in the complainant's testimony, and I believe a different result is probable on retrial.

As Judge GLEICHER aptly concluded in her dissent in this case:

> In summary, the prosecutor presented the [the complainant] as an ordinary wife and mother, engaged in a routine shopping trip, whom defendant senselessly and brutally attacked. The jury remained ignorant of other highly relevant facts, including the victim's prior participation in an online rape support group, which likely would have engendered reasonable doubt regarding her delayed and inconsistent description of the attack in the Meijer's parking lot. The impeachment evidence supplied by the California police reports, and the further information likely

[22] *Barbara*, 400 Mich at 363-364.

[23] See *Quiles*, 618 F3d at 392.

> to flow directly from additional investigation triggered by those reports, more probably than not renders the [complainant's] testimony incredible.[24]

I agree. Whether a jury would believe the complainant's version of events in light of the newly discovered evidence remains an open question. I simply note the gravity of the evidence and would hold that it makes a different result probable on retrial.

II. THE TRIAL COURT'S RULING

The majority opinion correctly holds that the trial court abused its discretion by denying defendant's motion for relief from the judgment because it ruled that impeachment evidence "cannot form the basis for . . . grant[ing] . . . a new trial."

I also believe that the trial court gave insufficient weight to the potential effect of the newly discovered evidence when considering defendant's motion for new trial. Instead, it commented on the testimony that went to the jury:

> Finally, this Court takes strong exception to defense counsel's version of the facts that came out at trial for the jury's consideration as contained in his Motion for New Trial. The statement of facts as contained in the Prosecutor's brief on this motion is much closer to my remembrance of the trial evidence. My point in commenting on this is that there was ample and strong competent evidence for the jury to convict Defendant independent of [the complainant's] testimony.

This analysis failed to recognize that the complainant's testimony was essential to defendant's convictions. And

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[24] *People v Grissom*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2009 (Docket No. 274148), p 15 (GLEICHER, J., dissenting).

it ignores the powerful effect of the newly discovered evidence on the complainant's credibility. Accordingly, I would further hold that the trial court abused its discretion by failing to properly weigh the newly discovered evidence.

III. CONCLUSION

I would hold that the newly discovered evidence constitutes material exculpatory evidence and satisfies the fourth *Cress* factor, making a different result probable on retrial. Accordingly, my preference would be to vacate defendant's convictions and remand this case to the trial court for a new trial.

MARKMAN, J. (*concurring*). I concur with the majority that the test set forth in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), for determining when a new trial is warranted on the grounds of newly-discovered evidence, can be satisfied by impeachment evidence. I further agree that such evidence may be of a general character and need not contradict specific testimony at trial. Rather, it is sufficient that such evidence have an exculpatory and material connection to testimony at trial, and otherwise satisfy the *Cress* test. Particularly in cases involving one-on-one credibility contests, I believe that the test adopted by the dissent may deprive a defendant of a new trial where newly-discovered evidence does not contradict specific testimony but nonetheless renders a new result probable upon retrial because no crime at all was committed. I also agree that newly-discovered impeachment evidence will only rarely justify the grant of a new trial, that this evidence cannot satisfy *Cress* if it concerns immaterial or collateral matters, and that it will be the exceptional case in which the necessary "exculpatory connection" to testi-

mony concerning a material matter will exist and a different result will be probable on retrial. Finally, I agree that it is appropriate to remand this case to the trial court so that it can evaluate defendant's motion for a new trial in light of our clarified *Cress* test.

I write separately, however, for two reasons. First, I wish to clarify that I do not join Justice MARILYN KELLY's concurrence with her own majority opinion for the same reason that I disagree with the dissenting opinion. Contrary to each of these opinions, I find this to be one of the most difficult and puzzling criminal cases that has come before this Court in recent years, and I am considerably less certain than my four colleagues as to how this matter should presently be resolved. I cannot join Justice KELLY's concurring opinion because, as the dissenting opinion compellingly observes, there is significant existing evidence of defendant's conduct that suggests guilt. I also cannot join the dissenting opinion because, as Justice KELLY compellingly observes, there is much about the accuser's conduct that suggests that guilt could never have been established almost exclusively on the basis of the accuser's testimony had the newly-discovered evidence been available to the jury. As a result, I am satisfied to remand to allow the trial court to assess the *entirety* of the available evidence in applying the *Cress* test.

Second, I write separately to summarize both the newly-discovered and the existing evidence that must be considered by the trial court upon remand. The trial court clearly believed that impeachment evidence could *never* establish the basis for a new trial, and therefore can be said to have abused its discretion as a matter of law. *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). Now that this Court has clarified that such evidence *can* under the proper circumstances establish such a basis, a remand is appropriate for the trial court's

consideration of *Cress*. A review of the newly-discovered evidence in this case indicates the following:

> —In California, approximately four months after the reported assault at issue in this case (but before the complainant reported that assault), the complainant called her father and told him she had been kidnapped and was being held in a room with no windows. Her father told the police he did not believe the complainant, explaining that he was "afraid it's just a smoke screen" because complainant "likes to have a lot of attention." Finally, the complainant's husband told police that her clothing and toothbrush were missing.
>
> —Police discovered that the complainant was actually in California staying with friends, and that she had told those friends that she had been raped several times, including by her brother in Colorado, and that her husband had been "in on it."
>
> —When contacted by police, the complainant stated that a man and woman had kidnapped her at knife point, driven her to a concrete block room with no lights or windows, and given her six large, white pills. The complainant stated that the man robbed her of her jewelry.
>
> —The complainant then recanted her report of the robbery and kidnapping, stating that it "never occurred" and that her friends, whom she had met in an online rape support group 18 months earlier, had picked her up from the restaurant.
>
> —The complainant explained that she had joined the rape support group *before* being raped in Michigan because "she was raped when she was six years old" and "she has been in and out of support groups and therapy for years." However, the complainant's husband expressed "a difficult time believing [she] was telling the truth."
>
> —The complainant told the police that she had planned to spend the night with her friends without telling her husband or family and had fabricated the kidnapping story to "buy some time" to be alone.
>
> —The complainant then gave a third version of what happened outside the restaurant, one that was strikingly similar to the assault at issue here. The complainant told

the police that she never went in the restaurant; instead, a man grabbed her, put a knife to her back, and assaulted and raped her in the restaurant parking lot between two parked cars. The complainant then stated that she went in to the restaurant and had lunch with her family.

—When asked about the complainant's reported rape in the parking lot of the restaurant, her mother reported that the complainant was never alone in the parking lot of the restaurant. Rather, the complainant had gone in the restaurant with the rest of the family and appeared fine at lunch.

—When the complainant went to the hospital after reporting the rape in the restaurant parking lot, she told the police that the man had inserted a small, hand-held, gray flashlight into her vagina, as well as penetrating her digitally and then with his penis. The complainant said that the man wore a green mask and fled when she began screaming and hitting him. The complainant "had some injuries consistent with a sexual assault."

—The complainant then told the police that in Colorado she had been raped by her brother's friend, who had "tracked her down" at her motel. She later recanted this story and denied that any assault had occurred in Colorado.

—The complainant told the fiancé of her friend from the online rape support group that her brother and his friends had gang-raped her 18 months earlier and that they had been convicted. The complainant said that her brother had found her in Colorado after he was released from jail and raped her again and that she thought her husband was also involved.

—The complainant's friend's fiancé, a police officer, reported that the complainant had lied to them, that she might be mentally unstable, and that he was worried she might raise false allegations about him.

—As the majority opinion observes, the California police reports "show that complainant reported to police, family or friends that she had been raped by at least eight different people on at least nine separate occasions."

On remand, the trial court should consider this newly-discovered evidence in conjunction with the evidence,

both inculpatory and exculpatory, that was previously offered at trial. This includes at least the following:

—Although the complainant claimed that defendant raped her in a Meijer parking lot during the middle of the day, no witnesses reported seeing or hearing anything at Meijer that day.

—The complainant considerably delayed reporting the alleged sexual assault.

—The complainant provided varying accounts of the alleged assault.

—The physician who examined the complainant after the alleged assault testified that there were other possible explanations than rape for the complainant's physical injuries.

—The complainant picked a person other than defendant out of a corporeal lineup.

—The complainant claimed that she believed she saw defendant wearing the gold ring he wore during the alleged assault more than a year after defendant had pawned the ring.

—Although the complainant admitted that she knew that DNA evidence could be obtained from clothing, she threw away all the clothing she had worn during the alleged assault.

—Defendant was employed at the store at which the assault allegedly occurred and worked on that date, with his shift beginning shortly after the assault allegedly took place.

—The complainant identified defendant after viewing more than 7,500 photographs.

—The complainant described her attacker as having a skull tattoo on his upper right arm, and defendant had such a tattoo on his upper right arm.

—Defendant lied about owning and pawning a ring that fit the complainant's description of her attacker's ring.

—Defendant dramatically altered his appearance shortly before his corporeal lineup.

—Medical and lay testimony reflected that the complainant suffered injuries to her face, shoulder, neck, arms, thighs, and vagina that were consistent with her testimony that she had been sexually assaulted.

When applying the *Cress* factors to a motion for a new trial, the trial court may consider only two classes of evidence: the claimed newly-discovered evidence and the evidence presented at the previous trial. Any evidence that falls outside these classes is plainly beyond the scope of the *Cress* process.

Precisely because of the very considerable strengths and the very considerable weaknesses of the evidence arrayed against defendant, this is a case in which a remand is appropriate so that the trial court can properly evaluate *all* of the evidence before rendering a final judgment on whether a new trial is warranted. This is a truly difficult and perplexing case, which makes it even more important that the trial court itself *first* consider the evidence in light of our clarification of the *Cress* test.

ZAHRA, J. (*concurring in part and dissenting in part*). I concur with the majority that the four-part test set forth in *People v Cress*[1] is used to determine whether a defendant has established entitlement to a new trial, and I further concur that newly discovered evidence that impeaches a witness may, in rare cases, be grounds for a new trial if it satisfies the *Cress* test. Specifically, I agree that a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial, but I strongly disagree that "it may be of a general character and need not contradict specific testimony at trial." *Ante* at 300. Rather, I believe that new impeachment

[1] *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003).

evidence could make a different result probable on retrial only if it directly contradicts material trial testimony in a manner that tends to exculpate the defendant.[2] Because I do not believe that defendant's new impeachment evidence satisfies the *Cress* test in this case, I dissent from the majority's application of the *Cress* test and its decision to remand this case to the trial court to again address this issue. The new evidence offered to impeach the complainant does not contradict *any* of her testimony at trial or address in any manner the events in this case. More importantly, this case did not hinge on the complainant's uncorroborated account of this assault. Substantial independent evidence at trial corroborated the complainant's testimony that defendant raped her:

• The complainant identified defendant after reviewing 7,800 photographs at a police station over the course of four to five days.

• Defendant worked at the very Meijer store in whose parking lot the rape occurred, and his shift began shortly after the rape.

• The complainant described a "gold nugget" ring that her attacker wore and used to rape her, and defendant pawned just such a ring *a mere four days after the rape*, but then denied to the police that he had ever owned such a ring until presented with evidence that he had pawned it.

• The complainant described a skull tattoo that defendant had on his upper right arm, a tattoo that was not visible when defendant was wearing his Meijer uniform.

• Defendant radically altered his appearance shortly before a lineup, to such an extent that the police officer

[2] See, e.g., *People v Armstrong*, 490 Mich 281, 291-292; 806 NW2d 676 (2011).

who had seen defendant *earlier that day* to tell him about the lineup could not recognize him.

• Medical and lay testimony reflected that the complainant suffered injuries to her face, shoulder, neck, arms, thighs, and vagina that were consistent with her testimony that defendant had beaten and raped her.

In my view, the majority fails adequately to account for this independent evidence in concluding that a remand is required to determine whether a different result is probable on retrial. Consider what a jury would have to believe in order to find that the complainant fabricated her rape claim. The jury would have to be convinced that the complainant, in perpetrating her false claim, spent four to five days at the police station looking at nearly 8,000 photographs and then was somehow able to select a person who (1) worked at the Meijer store at which complainant claimed the rape occurred, (2) began his shift shortly after the time of the alleged rape, (3) happened to own a gold nugget ring just like the one the complainant described, (4) happened to pawn that ring a few days after the alleged rape, (5) subsequently denied pawning the ring until presented with evidence that he did so, and (6) happened to have a skull tattoo on his upper right arm as complainant described. Not only would the jury have to believe all of this, but it would also have to conclude that defendant, despite his innocence, chose for some reason to alter his appearance by shaving his head and beard before a lineup. And a jury would also have to discount lay and medical testimony regarding the complainant's multiple injuries that were consistent with the beating and rape that she described.

In light of the substantial evidence that did not depend on the complainant's credibility, I cannot conclude that a jury on retrial would probably acquit defendant on the basis of the new impeachment evi-

dence. The trial court did not abuse its discretion by denying defendant's motion for a new trial. Accordingly, I would affirm the trial court's decision.

ANALYSIS

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.[3] An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes.[4] "A mere difference in judicial opinion does not establish an abuse of discretion."[5]

The majority correctly articulates the four-factor test that must be met before a new trial may be granted on the basis of newly discovered evidence:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.[6]

This test has existed in our caselaw for more than a century.[7] The only factor in dispute here is whether the new evidence makes a different result probable on retrial.[8]

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[3] *Cress*, 468 Mich at 691.

[4] *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

[5] *Cress*, 468 Mich at 691.

[6] *Id.* at 692 (quotation marks and citations omitted).

[7] See, e.g., *Canfield v City of Jackson*, 112 Mich 120, 123; 70 NW 444 (1897); *People v Pizzino*, 313 Mich 97, 110; 20 NW2d 824 (1945).

[8] The prosecution conceded in the trial court that defendant had satisfied the other three factors. Therefore, I agree with the majority that we should not consider the prosecution's argument, presented for the first time in this Court, that the newly discovered evidence is cumulative.

In *Spray v Ayotte*, this Court explained, "Ordinarily a new trial will not be granted because of newly discovered evidence to impeach a witness."[9] Subsequent cases have applied this principle in the criminal context.[10] I agree with the majority that our caselaw has not characterized this principle as a strict, per se rule prohibiting the grant of a new trial because of newly discovered impeachment evidence, even though some Court of Appeals panels have apparently treated it as such.[11] Rather, the principle enunciated in *Spray* simply recognizes that it is only in rare cases that newly discovered impeachment evidence will satisfy the traditional four-factor test for granting a new trial.[12]

The question thus arises regarding what unusual circumstances could permit newly discovered impeachment evidence to satisfy the *Cress* test. This Court in *Spray* cited the Cyclopedia of Law and Procedure, which delineates the exceptions to the general rule:

> Ordinarily a new trial will not be granted for newly

In any event, the prosecution's argument regarding that factor lacks merit given that the new evidence contains information that goes beyond the evidence presented at trial.

[9] *Spray v Ayotte*, 161 Mich 593, 595; 126 NW 630 (1910), quoting 29 Mack, Cyclopedia of Law & Procedure, p 918.

[10] See, e.g., *People v Serra*, 301 Mich 124, 133; 3 NW2d 35 (1942) ("A new trial will not ordinarily be granted because of newly-discovered evidence to impeach a witness."), citing *Spray*, 161 Mich 593.

[11] See, e.g., *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). As the majority observes, the case to which these decisions can be traced back, *Graham v Inskeep*, 5 Mich App 514; 147 NW2d 436 (1967), used language consistent with the *general* rule disfavoring new trials based on newly discovered impeachment evidence, thereby leaving open the possibility that a new trial may be granted in unusual circumstances.

[12] See, e.g., *Kube v Neuenfeldt*, 353 Mich 74, 82-83; 90 NW2d 642 (1958) (concluding that newly discovered evidence did not warrant a new trial when it was "merely cumulative" and "offered solely to impeach the testimony of" a witness); *United States v Quiles*, 618 F3d 383, 391-392 (CA 3, 2010).

> discovered evidence to impeach a witness. Thus evidence to show that a witness had made statements inconsistent with his testimony or to contradict him on immaterial or collateral matters is seldom ground for a new trial. But evidence of contradictory statements made by a witness on whose testimony a doubtful verdict was founded has sometimes been held sufficient cause for setting aside the verdict. Newly discovered evidence to successfully contradict a witness upon a material matter may be cause for allowing a new trial, and it is no objection to such allowance that the evidence may incidentally impeach a witness.[13]

Thus, newly discovered evidence that contradicts particular and material statements in a witness's testimony could potentially satisfy the four factors for granting a new trial, as opposed to newly discovered evidence that only serves to impeach a witness's credibility.[14]

Both federal and Michigan caselaw support this explanation for when a new trial is warranted. For example, in *United States v Saada*, a prosecution witness who testified pursuant to a cooperation agreement with the government was later caught on tape urging another indi-

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[13] 29 Mack, Cyclopedia of Law & Procedure, pp 918-921.

[14] Contrary to the majority's assertion, I have accurately described the principles enunciated in the Cyclopedia. The majority expresses disagreement with my use of the word "particular" in describing the types of material statements that must be contradicted in order to warrant a new trial. As the majority recognizes, however, the Cyclopedia states that "[n]ewly discovered evidence to successfully contradict a witness upon a material matter may be cause for allowing a new trial, and it is no objection to such allowance that the evidence may incidentally impeach a witness." It is difficult to discern how the majority interprets this language as referring to material statements that are somehow *not* particular. In any event, as this opinion will discuss, federal and state authorities support the proposition that newly discovered evidence to impeach a witness could make a different result probable on retrial if it directly contradicts material testimony by that witness at trial in a manner that tends to exculpate the defendant.

vidual to falsely implicate an innocent person *in another case* in order to receive a reduced sentence on a pending charge.[15] The defendants sought a new trial on the basis of this new evidence.[16] The United States Court of Appeals for the Third Circuit concluded that the new evidence did not satisfy the requirements for granting a new trial.[17] In particular, the court noted that the new evidence was "only impeaching" and that there was "no exculpatory connection" between the witness's act of urging someone to falsely implicate an innocent person in another case and the defendants' crimes.[18] Moreover, the new evidence would probably not have produced an acquittal because there was sufficient evidence of guilt independent of the witness's testimony.[19]

Relying in part on *Saada*, the Third Circuit in *United States v Quiles* summarized the general principle regarding newly discovered impeachment evidence as follows:

> [L]ong experience has shown that newly discovered evidence that is *merely* impeaching is unlikely to reveal that there has been a miscarriage of justice. There must be something more, i.e. a factual link between the heart of the witness's testimony at trial and the new evidence. This link must suggest directly that the defendant was convicted wrongly. . . . When this connection is not present, then the new evidence is merely impeaching and its revelation does not warrant granting a new trial.[20]

Therefore, "[w]hen asked to grant a new trial solely on the basis of new impeachment evidence, a court care-

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[15] *United States v Saada*, 212 F3d 210, 215-216 (CA 3, 2000).

[16] *Id.* at 215.

[17] *Id*. at 216.

[18] *Id*.

[19] *Id*. at 217.

[20] *United States v Quiles*, 618 F3d 383, 392.

fully should examine whether the defendant has demonstrated the necessary exculpatory connection between the evidence and the offense or has demonstrated that the newly discovered evidence totally undermined critical inculpatory evidence."[21] The exculpatory connection must be "strong."[22] Moreover, "[d]etermining the strength and importance of the exculpatory connection or the significance of the newly discovered evidence with respect to the credibility of critical evidence given at the trial is a difficult task that is left in the first instance to the discretion of the [trial] court."[23]

Recently, in *People v Armstrong*, we applied a similar analysis in the analogous context of a claim of ineffective assistance of counsel.[24] In *Armstrong*, the defendant's attorney failed to introduce cellular telephone records that revealed the complainant's frequent attempts to contact the defendant after his alleged rapes.[25] In concluding that the defendant was prejudiced by this failure, we acknowledged that the complainant's credibility at trial had been challenged in various ways, including with evidence that she had falsely accused another person of rape on a prior occasion.[26] "Although unquestionably significant, such attacks had less of a tendency to undermine the complainant's credibility than the cell phone records, which would have provided documentary proof strongly suggesting that the complainant lied to *this* jury regarding her actions in connection with the alleged rapes in *this*

[21] *Id*.

[22] *Id*. at 395.

[23] *Id*. at 393.

[24] *Armstrong*, 490 Mich 281.

[25] *Id*. at 286-287.

[26] *Id*. at 291.

case."[27] That is, "[t]he cell phone records revealing frequent communication with defendant following the alleged rapes would have cast serious doubt on the *substance* of her accusations."[28]

In light of these authorities, I conclude that newly discovered evidence to impeach a witness could potentially make a different result probable on retrial if it directly contradicts material testimony by that witness at trial in a manner that tends to exculpate the defendant. By contrast, new evidence that merely impeaches a witness on a collateral or immaterial matter, unrelated to the substance of the charges in the case at hand, lacks the requisite exculpatory connection to warrant a new trial.

In this case, defendant has failed to establish an exculpatory connection between the newly discovered evidence and the offense at issue. The new evidence consists primarily of police reports concerning events that occurred in California more than four months *after* the rape in this case.[29] The police reports contain no information that contradicts or even addresses the complainant's testimony at trial regarding the rape that occurred in this case. Thus, because the reports do not contradict *any* evidence presented at trial, let alone *material* evidence, an exculpatory connection simply does not exist.

What the California police reports do contain can only be described as a confusing series of hearsay statements attributed to the complainant regarding other purported sexual assaults that occurred at vari-

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[27] *Id*.

[28] *Id*. at 291-292 (emphasis added).

[29] The complainant did not initiate the California police reports, but she did initiate a police report in Michigan three years later reporting alleged childhood abuse, which led to the discovery of the California reports.

ous points in her life, including during her trip to California and during her childhood. Some of the hearsay statements are secondary or tertiary hearsay within hearsay. Although the reports suggest that the complainant retracted her accusation regarding an alleged assault in Colorado on her way to California and also retracted a claim that she was kidnapped in California, the record contains no direct evidence of falsity regarding the other alleged sexual assaults. It is thus not clear on what grounds the vast majority of the purported accusations would be admissible on retrial. Nor is it apparent on what theory the evidence of sexual-assault claims that occurred *after* the rape in this case would be admissible. Although a "defendant should be permitted to show that the complainant has made *false* accusations of rape *in the past*,"[30] no established theory of relevance has been identified for the admission of *subsequent* allegations of rape or of allegations for which *no evidence of falsity has been presented*.[31] Also, the reports contain no evidence of the complainant's sexual conduct that would be probative of bias or an ulterior motive to make a false charge.[32]

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[30] *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984) (emphasis added).

[31] Although the complainant did not report *to the police* the sexual nature of the assault in this case until more than a year later, i.e., after the events reflected in the California police reports, she did report the rape to at least four individuals within mere days of the assault. In particular, the complainant told her gynecologist and a friend about both the penile and digital penetrations within a few days of the assault, and she told her husband and an emergency room physician about the digital penetration within days as well. Thus, the alleged statements regarding sexual assaults contained in the California police reports, other than the vague references to childhood abuse, occurred *after* the rape in this case and *after* the complainant had reported the rape to at least four people. In no sense, then, has evidence been presented of any *false* accusations of rape *in the past* that may be admitted under *Hackett*.

[32] *Id*.

In her concurrence, Justice MARILYN KELLY aggregates the newly discovered hearsay evidence to engage in a speculative enterprise that would grant a new trial on the basis of evidence that might never even be admitted—and indeed might not even be admissible—at trial. However, when considering whether newly discovered evidence satisfies the *Cress* standard, the reviewing court should only consider admissible evidence.[33]

Even assuming, however, that the substance of the California police reports is somehow relevant and could be admitted, it is not clear whether a jury would find that this new evidence undermines the complainant's credibility to such an extent that the jury would disbelieve her testimony that defendant had raped her in Michigan four months earlier. Whatever exculpatory theory defendant might offer to explain the newly discovered evidence,[34] he simply has not established that a jury would more likely accept that theory than the prosecution's explanation, which is that the rape *in this case* caused the complainant to suffer from an emotional trauma that led to her subsequent actions in California. The prosecution explained this theory at the hearing on defendant's motion for relief from judgment or a new trial:

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[33] See, e.g., *People v Martin*, 116 Mich 446, 453; 74 NW 653 (1898) (stating that a motion for a new trial was properly denied because the evidence on which the motion was based "was hearsay"); *People v Borowski*, 330 Mich 120, 128; 47 NW2d 42 (1951) (applying *Martin* to deny a new trial requested because of newly discovered evidence that "was based wholly on hearsay").

[34] For example, Justice MARILYN KELLY's concurrence develops an exculpatory defense theory that the complainant may have engaged in a "scheme" to make false rape accusations. *Ante* at 325-326. In considering this theory, I note that there is no evidence that the complainant fabricated her rape claim against defendant. She has never retracted her testimony regarding the rape in this case.

> I would represent to the Court, I followed up on that when I received this material and I talked to an expert in the area of mental health and gave them the scenario and asked specifically: Is this unusual? Because that's what the defense has been representing to the Court here this morning, that this is outrageous, this is just unheard of that something like this would happen four to five months after a rape. But what this professional tells me is it's not unusual at all. You've got a victim suffering from Post Traumatic Stress Disorder. She's not been able to deal with what happened to her in that parking lot at Meijer. It hasn't been resolved. It hasn't even been reported to critical key people and so she's decompensating and that's what he told me and I fully expect, your Honor, had we had to hash this out in front of a jury, that not only he but other experts would come in and support that suggestion that this is not unusual behavior but, in fact, it corroborates what happened to her. It reinforces the fact that she had been through a traumatic experience in May of that year, which ultimately led to this behavior.

In short, it is far from obvious that any exculpatory defense theory would be more believable to a jury than the prosecution's theory that the rape caused an emotional trauma leading to the events in California. Remember, it is *the defendant's* obligation to satisfy the *Cress* factors,[35] including the fourth factor requiring that "the new evidence makes a different result *probable* on retrial."[36] Given that defendant has failed to articulate why a jury on retrial would more likely believe an exculpatory defense theory over the prosecution's alternative theory that is consistent with defendant's guilt, the fourth *Cress* factor has simply not been satisfied, and defendant is not entitled to a new trial.[37]

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[35] *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

[36] *Cress*, 468 Mich at 692 (emphasis added).

[37] Defendant notes that the new evidence includes a purported hearsay statement by the complainant allegedly reporting a rape in a parking lot in

Further undermining any exculpatory defense theory is that substantial independent evidence of guilt corroborated the complainant's testimony that defendant raped her.[38] The trial in this case was not a simple

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California that was similar to the rape in this case. It is not clear, however, that any similarity would cut in favor of the defense's theory and against the prosecution's theory. According to the National Institute of Mental Health, flashbacks are a common side effect of a form of posttraumatic stress disorder that may result from a rape. "A person having a flashback may lose touch with reality and believe that the traumatic incident is happening all over again." <http://www.nimh.nih.gov/health/publications/anxiety-disorders/complete-index.shtml#pub4> (accessed July 30, 2012). The Rape, Abuse & Incest National Network indicates: "A flashback is when memories of past traumas feel as if they are taking place in the current moment. Many survivors of sexual violence experience these emotional returns to the trauma, believing themselves to be back at the scene of the attack or abuse." <http://rainn.org/effects-of-sexual-assault/flashbacks> (accessed July 30, 2012). Moreover,

> [f]lashbacks can be triggered by many stimuli, such as sensory or emotional feelings. It can sometimes feel as though flashbacks come from nowhere, making it difficult to distinguish between past and present. They can often leave the survivor feeling anxious, scared, powerless, or any other emotions they felt at the time of their assault.
>
> Some flashbacks are mild and brief, a passing moment, while others may be powerful and last a long time. Many times the individual does not even realize that s/he is having a flashback and may feel faint or dissociate. [*Id.* (citation omitted).]

Thus, given this possible explanation for the complainant's hearsay statement in California describing an incident similar to the rape in this case and the prosecution's representation that it has an expert who would support a theory that the complainant was suffering from posttraumatic stress disorder, defendant has failed to establish that the admission of the complainant's statement would tend to support the defense theory.

[38] Even under the less demanding standard for establishing a violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)—which does not apply here because it is undisputed that no *Brady* violation occurred—"[t]he force of impeachment evidence . . . is dimin-

"he said/she said" credibility contest. When testifying regarding the beating and the digital and penile penetrations by the use of force that defendant committed after he approached her minivan in a Meijer parking lot, the complainant described a "gold nugget" ring, containing several small stone chips and ridges, that defendant inserted into her vagina with the middle finger of his left hand during the assault. When questioned by the police, defendant initially denied that he had ever owned *any* jewelry, including a gold nugget ring. But when presented with evidence that he had pawned a gold nugget ring at a business called The Hock Shop a mere four days after the alleged rape, defendant admitted that he had indeed pawned the ring there. The owner of The Hock Shop identified defendant at trial as the person who pawned the ring four days after the rape, and the owner's records confirmed that defendant did so.[39]

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ished when the witness's testimony is supported by substantial corroborating evidence or when the impeachment evidence is cumulative or collateral," *United States v Ramos-Gonzalez*, 747 F Supp 2d 280, 291 (D PR, 2010), citing *United States v Connolly*, 504 F3d 206, 217 n 6 (CA 1, 2007); see also *Smith v Cain*, 565 US ___; 132 S Ct 627, 630; 181 L Ed 2d 571 (2012) ("We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."). Moreover, it is widely recognized that the *Brady* standard is *more* "defendant-friendly" than the standard for granting a new trial on the basis of newly discovered evidence. See, e.g., *United States v Agurs*, 427 US 97, 111; 96 S Ct 2392; 49 L Ed 2d 342 (1976); *Connolly*, 504 F3d at 212; *United States v Frost*, 125 F3d 346, 382 (CA 6, 1997); *United States v Duke*, 50 F3d 571, 576-577 (CA 8, 1995); *United States v Johnson*, 380 F Supp 2d 660, 678 (ED Pa, 2005). Thus, even under a *more* defendant-friendly standard for granting a new trial than the one that applies here, it is recognized that the force of impeachment evidence is diminished when the witness's testimony is supported by strong corroborating evidence.

[39] Defense counsel suggested at oral argument that defendant might have forgotten that he owned the ring. But given that defendant initially denied to the police not merely that he had owned such a ring but that he

In addition, defendant worked at the Meijer store in whose parking lot the rape occurred. His shift started shortly after the rape. Defendant also had a skull tattoo on his upper right arm that would not have been visible when he was wearing his Meijer uniform. The complainant identified such a tattoo when describing defendant, stating that she saw part of the tattoo during the assault. A Meijer employee testified that employees are not required to wear their uniforms on the way to work; they are permitted to wear street clothes and then change when they arrive.[40]

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had ever owned *any jewelry whatsoever*, it seems unlikely that a jury would believe that defendant entirely forgot that he once owned a gold nugget ring and then pawned it.

[40] Although portions of the Meijer parking lot were subject to surveillance video, the officer who reviewed the tapes testified that "[t]hey're absolutely poor quality. You couldn't see -- just barely make out the cars themselves. Poor quality, we could not see anything on the tapes." Also, a Meijer employee acknowledged that there were areas of the parking lot that the cameras did not cover and that it was difficult to identify people the further they were from the doors. The complainant testified that she parked between two vehicles, "quite a ways from the doors." Further, the video of the parking lot is displayed inside the Meijer store. Thus, defendant, a Meijer employee, could have regularly watched the video to determine whether a particular area of the parking lot was covered by the cameras. As the prosecutor observed during closing argument, defendant "knew that parking lot. He knew that store. He knew what the video showed and what it didn't show. And when he found his vulnerable victim, he took his chance."

On a related note, although defendant notes that the attack occurred in a parking lot in daylight hours and that no one reported seeing the assault, the circumstances of the assault reflect that defendant took steps to minimize the chance of the complainant's being seen or heard by others. The complainant, who was getting out of her minivan when defendant attacked her, testified that she fell back into her vehicle after defendant punched her face with his fist. She then fell farther back into the vehicle when he hit her again, causing her to lose consciousness with her head between the two front bucket seats of the vehicle. After the complainant regained consciousness and tried to sit up, defendant pulled her pants and underwear down around her knees. When the complainant

The complainant identified defendant after looking at 7,800 photographs at the police station over a period of four to five days. The first 6,800 photographs that she reviewed were contained in eight loose-leaf books. The books did not contain any identifying information regarding the persons in the photographs. She then looked at approximately 1,000 photographs in digital format on a computer. The digital format also did not reveal any identifying information about the persons shown. An officer testified that after the complainant had reviewed approximately 1,000 digital photographs, she became "quite emotionally upset, left the computer, went into a separate room crying and very visibly emotionally upset." She then informed the officer that she had found the picture of the man who attacked her. Defendant was the person depicted in the photograph. The picture was taken a little more than two months after the rape in this case.

A lineup was then held. On the morning of the lineup, an officer went to defendant's house to tell him to appear

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saw defendant's erect penis and realized what was going to happen, she tried to sit up partway, but defendant hit her several times in the chest and collarbone to knock her back down, calling her "a stupid bitch." Defendant then stated, "[T]his will shut you up" and, after sliding his ridged gold nugget ring to the middle knuckle of his finger, inserted his finger and the ring into her vagina. Reacting to the pain, the complainant called defendant a "bastard," and in response defendant cut her face by striking her with the back of his hand. The complainant tried to scream, but it was difficult for her to breathe because of having been struck several times in the chest, which knocked the wind out of her. After defendant inserted his penis into the complainant's vagina, she again lost consciousness.

Thus, given that (1) the attack occurred largely inside the complainant's vehicle, into which defendant had pushed her and which was parked between two other vehicles "quite a ways from the doors," and (2) defendant's repeated battering of the complainant rendered her unconscious for part of the assault and made it difficult for her to breathe or scream, the evidence indicates that defendant's own actions decreased the likelihood that anyone would see or hear the complainant as he beat and raped her.

for the lineup. When the officer saw defendant at his house that morning, he had "long hair, the long goatee-type, scraggly-looking beard. Unkept [sic]. He looked very unkept [sic]." Later that day, the officer went to the police station lobby to get defendant for the lineup. The officer testified: "There was [sic] several people sitting around in the lobby and I went back in, he wasn't -- I said he wasn't there. I didn't recognize him in the lobby." The officer then learned that defendant actually had been sitting in the lobby when the officer went to look for him. The officer had not recognized defendant in the lobby because "[h]e had shaved all of his hair off, all of his facial hair, completely, completely changed the way I'd seen him hours earlier." A second officer who had seen a photograph of defendant also looked for him in the lobby, saw several people, and "didn't believe he was there." The second officer explained that she did not recognize defendant because "[h]e appeared very different from the photograph that I had seen of him." In particular, when he arrived for the lineup defendant "was pretty well clean-shaven, his head, his face." He also appeared heavier than in the photograph.[41]

In addition to this independent evidence of defendant's guilt, evidence of the complainant's behavior and physical condition following the attack corroborated her testimony. The complainant's husband testified that when she returned from Meijer that day, she looked panicked and terrified. She also had a cut near her mouth. The complainant immediately went to her bedroom.[42] When her husband followed her into the bedroom and asked her what had happened, the complain-

[41] Just like the police officers who were unable to identify defendant before the lineup, the complainant was also unable to identify defendant after he changed his appearance for the lineup.

[42] The complainant testified that she went to the bedroom because her children were sitting in the kitchen and she did not want them to see her.

ant "was quite upset. She had a hard time finishing any sentences. Just kind of incoherent, rambling."[43] Within the next day or two, the complainant's husband saw large bruises on both of her arms and legs, including on her thighs. The complainant was still very upset when she went to the emergency room four days after the assault, and she had difficulty relating the event. Also, the police officer who took the initial report two days after the assault saw a large scratch on the complainant's face and bruises on her shoulder. He testified that she was complaining of soreness on her chest, arms, and "pretty much all over."[44] A friend whom the complainant had told about the rape three days after it occurred testified that the complainant was "very slow in speaking," distant, and fearful.

The complainant first went to the emergency room two days after the assault. She did not disclose the sexual nature of the assault at that time but was treated for injuries to her left shoulder, neck, and arm.[45] Her left arm was bruised and swollen and was placed in a sling. Two days later, the complainant called her gynecologist and reported that she had been sexually as-

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[43] According to the complainant, she did not tell her husband about the sexual nature of the assault at that point because "I wasn't ready to face [it] myself. And I didn't know how to break his heart." Three days later, she told her husband about the digital penetration, but she did not disclose the penile penetration because "it was obvious he was in pain thinking about [the digital penetration]. I could see what I was doing to him and I couldn't go any further."

[44] The complainant did not tell the officer about the sexual nature of the assault at this point because "I hadn't told my husband. I couldn't imagine him hearing it from someone else. And I wasn't comfortable. Admitting it to [the officer] would be admitting it to myself."

[45] The complainant testified that she did not disclose the rape during this first visit to the emergency room because she was in a room with six other beds and because she had already taken a shower and did not think anything could be done.

saulted and wanted a full exam because she was growing worried about possible repercussions given that her assailant had not used a condom. She told the gynecologist about the penile penetration. The gynecologist directed the complainant to go back to the emergency room. Later that day, the complainant returned to the emergency room and reported the digital penetration but not the penile penetration.[46] A full rape kit was not prepared because only a digital penetration was reported and four days had passed since the assault. The complainant reported vaginal pain. An examination revealed internal abrasions on the right side of the vagina and the cervical area deep in the vagina. The attending physician testified that although other explanations were possible, his findings were consistent with a forceful digital penetration and a forceful penile penetration.

Eleven days after the rape, the complainant saw her gynecologist, who testified that the complainant was anxious and depressed. An examination revealed abrasions and scratches along the inner labia. The vaginal area was normal, but "[t]he vaginal area heals very quickly. So over a matter of a few days those would probably no longer be visible." Abrasions that had occurred 11 days earlier would have been "healed by that point." The gynecologist also observed "obvious" bruises on the complainant's arms and inner legs.

More than a year later, the complainant told the police about the sexual nature of the assault after she

[46] The attending physician, a male, acknowledged that not all patients are comfortable with him and that female victims are sometimes uncomfortable telling male physicians about being raped. The physician further explained that he had "seen more alleged rape victims seen [sic] at a later time than at the time that the rape was committed" and that "[i]t's not unusual to obtain more and more information as the patient opens up to the matter to gain more information as the days progress."

saw someone in a car behind her who matched the description of her assailant. The complainant explained that she went to the police because she felt "stronger" at that point and "wasn't willing to live in fear anymore. I was ready to do what I needed to do. To get the person off the street who hurt me and changed my life."[47] It was then that she reviewed the 7,800 photographs at the police station and identified defendant.

It is noteworthy that, as the Court of Appeals majority observed, defendant had already impeached complainant's credibility at trial

> by pointing out that she did not immediately report the nature of the attack and further, that her descriptions of the attack, while not wholly inconsistent, were incremental in the manner that she released the information to her husband and to the authorities. The [California] police reports of events that took place *after* the victim told several people that she had been raped and *after* objective evidence thereof had been obtained does not cast much doubt on events that took place several months earlier in Michigan.[48]

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[47] The complainant testified at the preliminary examination that she could identify a ring on the hand of the person in the car behind her, and she then explained at trial that she "identified that ring as being in the same position on his hand as the ring the day I was assaulted." She did *not*, however, testify that it was the *same* ring as the one worn during the assault. As the prosecutor explained at oral argument, the point of this testimony was not to establish that defendant *actually* was the person driving behind her that day or that the person was wearing the same ring that defendant was wearing on the day of the assault, but that the complainant's observation of a person matching defendant's description was what led her to report the sexual nature of the assault to the police.

[48] *People v Grissom*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2009 (Docket No. 274148), p 10. The Court of Appeals majority's reasoning is consistent with the principle, discussed in the less demanding *Brady* context, that "[i]mpeachment evidence, even that which tends to further undermine the credibility of the key Government witness whose credibility has already been shaken due to extensive cross-examination, does not create a reasonable doubt that did not

In short, defendant has not established that a different result is probable on retrial because (1) the newly discovered evidence does not contradict any material (or, for that matter, immaterial) evidence presented at trial or pertain in any way to the offenses committed in this case, (2) the complainant had already been impeached in various ways at trial regarding her failure to immediately report the nature of the attack, and (3) significant objective evidence corroborates complainant's testimony that defendant raped her. As the Court of Appeals majority explained:

> [T]he significant objective evidence — defendant's presence in the vicinity of the crime, the victim's description of defendant's tattoo and ring, defendant's denial that he owned the ring, defendant's pawning of the ring only four days after the attack, the victim's identification of defendant's picture, defendant's radical change in appearance during the short time between being told to attend a lineup and his appearance therein, and medical evidence of injuries consistent with a sexual assault — did not involve the victim's credibility and were legally sufficient to support defendant's convictions. Moreover, none of it is affected in any way by the California police reports.[49]

To reach a different result on retrial, then, a jury would have to conclude not merely that the complainant fabricated her rape claim, but that after going through 7,800 photographs, she found the proverbial needle in the haystack, somehow choosing a photograph of an innocent man who coincidentally (1) worked at the location of the alleged rape, (2) was in the vicinity at the time, (3) had a ring like the one she described, (4) pawned the ring four days later, (5) subsequently denied

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otherwise exist when that evidence is cumulative or collateral." *United States v Sanchez*, 917 F2d 607, 618-619 (CA 1, 1990) (citation and internal quotation omitted); see also *Connolly*, 504 F3d at 217.

[49] *Grissom*, unpub op at 10 n 16.

ever owning such a ring or, for that matter, any jewelry, (6) had a skull tattoo on his right upper arm like the one she described, and then (7) inexplicably shaved his head and beard right before a lineup.[50] And this conclusion must be reached despite the complainant's medically documented injuries that were consistent with a rape and a beating.

We must not overlook that our review of this issue is deferential. It was the trial court, not the members of this Court, who tried the case and heard the evidence and thus was "without question . . . in the best position to determine if the new [evidence] would tend to produce a probable different result on a retrial."[51] The trial court possessed a superior ability to assess in the first instance the strength and importance of the newly discovered evidence in relation to the evidence presented at trial.[52] The majority states that the trial court

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[50] Or as the prosecutor stated during closing argument at trial:

> Lots of people have skull tattoos on their right upper arm who work at Meijer with a gold nugget ring who were working that day? I don't think so. And I trust your reason and logic and common sense in assessing that testimony. There could be dozens of people walking around with skull tattoos, but not there, not working at Meijer, not with a gold nugget ring. And not in the 7800 photographs that [the complainant] picked this Defendant out of.
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> * * *
>
> . . . It's not a coincidence. You can't explain it away. She picks out that photograph from nearly 8,000. He works at Meijer. He's working an hour and a half after this happened. He's got a ring. He's got the tattoo exactly where she said it was. You can't explain away that evidence.

[51] *Graham*, 5 Mich App at 524.

[52] See *Quiles*, 618 F3d at 393 ("Determining the strength and importance of the exculpatory connection or the significance of the newly discovered evidence with respect to the credibility of critical evidence given at the trial is a difficult task that is left in the first instance to the

abused its discretion by denying a new trial because it erroneously believed that impeachment evidence could never be the basis for a new trial. However, the trial court also took note of the significant evidence of guilt that was independent of the complainant's testimony:

> Finally, this Court takes strong exception to defense counsel's version of the facts that came out at trial for the jury's consideration as contained in his Motion for a New Trial. The statement of facts as contained in the Prosecutor's brief on this motion is much closer to my remembrance of the trial evidence. My point in commenting on this is that there was ample and strong competent evidence for the jury to convict Defendant independent of [the complainant's] testimony.

This conclusion regarding the independent evidence of guilt fell within the range of reasonable and principled outcomes and fully supports the decision to deny a new trial. Therefore, to the extent that the trial court also based its decision in part on an erroneous line of Court of Appeals caselaw, reversal is not required. "A correct result may be reached and affirmed, although based on a wrong reason."[53]

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discretion of the [trial] court."). In her separate concurring opinion, Justice MARILYN KELLY says that the judge who tried this case has now retired, that a new judge will be assigned on remand, and that my discussion of the deference owed to the trial court is thereby unfounded. But as my analysis makes clear, I am deferring to the *original* trial judge who *already* denied defendant's motion for new trial; this is *the very same judge* who tried the case and heard the evidence. Thus, it is entirely appropriate to accord deference to the trial court. I also note that it is not uncommon for a retired judge to be temporarily assigned to address a matter on remand.

[53] *People v Cooper (On Rehearing)*, 328 Mich 159, 162; 43 NW2d 310 (1950); see also *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). The majority inexplicably ignores this alternative basis on which to affirm the trial court's decision. Indeed, the majority fails even to acknowledge, let alone apply, the widely recognized and entirely uncontroversial principle that a correct result may be affirmed

Finally, the majority cites no authority for its assertion that "[t]he only facts that the trial court should consider in deciding whether to grant a new trial are those in the newly discovered evidence and those in the record." *Ante* at 321. Whatever the merits of this unsupported assertion,[54] it is difficult to square with Justice MARILYN KELLY's concurrence, in which she opines that "the newly discovered evidence has evidentiary value because, on trial, it may permit defendant access to the complainant's medical, counseling, and psychological records," including the complainant's rape-support-group records. *Ante* at 326. *None* of those records are part of the newly discovered evidence, nor are they in the record. Thus, *under the majority's own opinion*, consideration of those records would appear to be entirely off limits in deciding the motion for new trial.

CONCLUSION

In conclusion, I concur that the *Cress* test is used to determine whether a defendant is entitled to a new trial and that new impeachment evidence may, in rare cases, satisfy the *Cress* test. In particular, I agree with the majority that a material exculpatory connection must exist between the new impeachment evidence and significantly important evidence presented at trial, but I

even if reached for an incorrect reason. It is not clear why the majority declines to affirm on this alternative ground.

[54] In *Cress*, 468 Mich at 685, this Court noted that the trial court in that case had granted the prosecution's motion to reopen proofs regarding the defendant's motion for a new trial. In my view, the majority's language here should not be read to preclude when appropriate the possible reopening of the record as discussed in *Cress*. I express no definitive view on this point with respect to this case because I conclude that a different result is not probable on retrial given the facts presented in the newly discovered evidence and at the original trial.

strongly disagree that such new evidence "may be of a general character and need not contradict specific testimony at trial." *Ante* at 300. New impeachment evidence could make a different result probable on retrial only if it directly contradicts material trial testimony in a manner that tends to exculpate the defendant. I respectfully dissent from the majority's application of the *Cress* test and its decision to remand this case to the trial court. The trial court reached a reasonable and principled outcome by denying a new trial because the new impeachment evidence here does not make a different result probable on retrial. I would therefore affirm the trial court's decision.

YOUNG, C.J., and MARY BETH KELLY, J., concurred with ZAHRA, J.

PEOPLE v LIKINE

PEOPLE v PARKS

PEOPLE v HARRIS

Docket Nos. 141154, 141181, and 141513. Argued October 6, 2011 (Calendar Nos. 2, 3, and 4). Decided July 31, 2012.

Selesa A. Likine was convicted by a jury in the Oakland Circuit Court of failing to pay child support in violation of MCL 750.165 and sentenced to one year of probation. The court, John J. McDonald, J., had granted the prosecution's motion in limine to preclude Likine from offering any evidence of her alleged inability to pay the ordered child support under *People v Adams*, 262 Mich App 89 (2004), which held that failing to pay child support is a strict-liability crime to which inability to pay is not a defense. After her conviction, Likine moved for reconsideration of the order granting the motion in limine, for relief from the conviction, and for a new trial, arguing that MCL 750.165 was unconstitutional and that preventing her from presenting an inability-to-pay defense violated her right to due process. The court denied the motions, and Likine appealed. The Court of Appeals, FITZGERALD, P.J., and CAVANAGH and DAVIS, JJ., affirmed, 288 Mich App 648 (2010), and the Supreme Court granted Likine's application for leave to appeal, 488 Mich 955 (2010).

Michael J. Parks was convicted of violating MCL 750.165 after a bench trial in the Ingham Circuit Court, William E. Collette, J., for failing to pay child support between 2006 and 2008. He was ordered to pay restitution and sentenced to five years' probation and one year in jail, which would be suspended if he paid a portion of the restitution. In 2003, the amount of Parks's child support obligation had been raised from $230 a week to $761 a week on the basis of an imputed income that Parks testified at trial was too high given the nature of his medical practice, his probation conditions, and his physical disability, but his requests to modify the amount had been denied. The Court of Appeals, OWENS, P.J., and SAWYER and O'CONNELL, JJ., affirmed his conviction and sentence on the basis of *Adams* in an unpublished opinion, issued April 20, 2010 (Docket No. 291011), and the Supreme Court granted Parks's application for leave to appeal, 488 Mich 955 (2010).

Scott B. Harris pleaded guilty in the Muskegon Circuit Court, Timothy G. Hicks, J., to a charge of violating MCL 750.165 by failing to pay child support. Harris was sentenced as a fourth-offense habitual offender, MCL 769.12, to 15 months' to 15 years' imprisonment, which the court agreed to delay imposing for approximately two months so that Harris could pay the arrearage amount. When Harris had not done so by the appointed date, the court imposed the sentence of imprisonment. Harris moved to withdraw his plea or for resentencing, claiming that he had tried to generate income but could not because of his health conditions. The court denied the motion, stating that it was bound by *Adams* to apply MCL 750.165 as a strict-liability statute. The Court of Appeals denied Harris's delayed application for leave to appeal for lack of merit, and the Supreme Court granted Harris's application for leave to appeal. 488 Mich 955 (2010).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices MARKMAN and ZAHRA, the Supreme Court *held*:

MCL 750.165 imposes strict liability for failing to pay child support, and evidence of a defendant's inability to pay, without more, is not a valid defense to a charge of felony nonsupport under that provision. However, a defendant charged with felony nonsupport may, in exceptional circumstances, on making the requisite evidentiary showing, establish impossibility as a defense.

1. MCL 750.165 provides that if a court orders an individual to pay support for his or her child and the individual does not pay the support, the individual is guilty of a felony. Before its amendment in 1999, MCL 750.165 penalized only those who refused or neglected to pay child support. Following the Legislature's deletion of the language relating to refusal or neglect, nothing in the wording of the current version of MCL 750.165 supports a construction that would include a fault, intent, or *mens rea* element. Further, criminal nonsupport is the type of crime that generally falls within the class of crimes for which no criminal intent is necessary because it benefits not only the child but also the well-being of the community at large. Accordingly, *Adams* properly held that MCL 750.165 imposes strict liability.

2. Generally, the commission of a crime requires both an *actus reus*, or wrongful act, and a *mens rea*. A strict-liability crime, including felony nonsupport, includes no *mens rea* element, only an *actus reus*. The common-law defense of impossibility, if proved, is an established defense to a crime of omission that negates the *actus reus*. Like the involuntariness defense to crimes that penalize an affirmative act, the defense of impossibility to crimes that

penalize an act of omission must be based on something outside the defendant's control. When it is genuinely impossible for a defendant to discharge a duty imposed by law, the defendant's failure is excused.

3. The language of MCL 750.165 provides no indication that the Legislature intended to abrogate common-law impossibility as a defense to felony nonsupport. Accordingly, genuine impossibility is a defense to the charge of felony nonsupport under MCL 750.165 if supported by sufficient evidence. To establish an impossibility defense for felony nonsupport, a defendant must show that he or she acted in good faith and made all reasonable efforts to comply with the support order, but could not do so through no fault of his or her own. Sufficient bona fide efforts to seek employment or borrow money in order to pay are expected, but standing alone will not necessarily establish an impossibility defense to a charge under MCL 750.165. Defendants charged with felony nonsupport must make all reasonable efforts and use all resources at their disposal to comply with their support obligations. For the payment of child support to be truly impossible, a defendant must have explored and eliminated all the reasonably possible, lawful avenues of obtaining the revenue required to comply with the support order. Defendants must not only establish that they cannot pay, but that theirs are among the exceptional cases in which it was not reasonably possible to obtain the resources to pay.

4. To determine whether a defendant has established impossibility in the context of a felony nonsupport case, courts should consider whether the defendant has diligently sought employment; whether the defendant can secure additional employment, such as a second job; whether the defendant has investments that can be liquidated; whether the defendant has received substantial gifts or an inheritance; whether the defendant owns a home that can be refinanced; whether the defendant has assets that can be sold or used as loan collateral; whether the defendant prioritized the payment of child support over the purchase of nonessential, luxury, or otherwise extravagant items; and whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind. This list of factors, however, is not exhaustive. The existence of unexplored possibilities for generating income suggests that a defendant has not raised a true impossibility defense, but merely an assertion of inability to pay.

5. To be entitled to a jury instruction on the affirmative defense of impossibility, a defendant must present prima facie evidence from which the finder of fact could conclude that it was

genuinely impossible for the defendant to pay the support. If a defendant has made this threshold showing and is entitled to an instruction, then the defendant may be exonerated if the trier of fact finds that the defendant has established by a preponderance of the evidence that it was genuinely impossible for him or her to comply with the support order for each and every violation within the relevant charging period. Because the record of the defendant's conduct and responses in the family court proceedings is relevant to determining the possibility of compliance with the support order and evaluating the defendant's good-faith efforts, both the defense and the prosecution may rely on that record in addition to any other relevant evidence. Evidence that the defendant was not truthful, hid assets, failed to accurately document the resources and assets at his or her disposal, was voluntarily unemployed or underemployed, failed to exhaust all reasonable and lawful means of generating the income necessary to satisfy the support obligation, or failed to seek timely modification of the family court order when it became evident that it could not be performed may, singly or in combination, defeat a claim that it was impossible for the defendant to comply with the support order. The family court's determination by a preponderance of the evidence of the amount a defendant is capable of paying does not preclude a defendant from asserting impossibility as a defense to a charge of felony nonsupport, which must be proved beyond a reasonable doubt.

6. The evidence Likine sought to introduce relating to her mental illness, incapacitation, and disability might establish impossibility if submitted to and believed by a jury. Under the circumstances, and given the undeveloped state of the record, it could not be concluded that excluding this evidence was harmless beyond a reasonable doubt. Accordingly, the judgment of the Court of Appeals in *Likine* must be reversed and the case remanded to the circuit court for a new trial.

7. Parks neither asserted nor sought to assert an impossibility defense at his criminal trial for felony nonsupport. Instead, he asserted for the first time in the Court of Appeals that his inability to pay was a defense to the charge of felony nonsupport. Because no plain error occurred, the judgment of the Court of Appeals in *Parks* was affirmed.

8. Harris entered an unconditional guilty plea to the charge of felony nonsupport. An unconditional guilty plea that is knowing and intelligent waives claims of error on appeal, even claims of constitutional dimension. He therefore failed to preserve the constitutional issue presented in this case, and he admitted the

factual basis for his guilt. Accordingly, the circuit court did not abuse its discretion by refusing to allow Harris to withdraw his plea, and he is not entitled to relief.

Likine reversed and case remanded to the circuit court for further proceedings.

Parks affirmed.

Relief denied in *Harris*.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would have overruled *Adams* and held that an inability to pay is the proper defense to a charge of felony nonsupport, concluding that the Legislature's enactment of the current version of MCL 750.165 without addressing the inability-to-pay defense indicated its acquiescence to the continued availability of that defense. Under the inability-to-pay defense, the defendant would have to show that he or she has made all reasonable and good-faith efforts to comply with the support order but could not. The majority's unique impossibility-to-pay standard adopts a legal concept that traditionally applied only to factual and legal impossibility in attempt crimes and is only marginally supported by one case that applied the concept of impossibility in a manner more akin to the concept of inability to pay. No other state requires a defendant to prove impossibility as a defense to a charge of felony nonsupport. She further stated that the majority's standard will unconstitutionally deprive defendants of the meaningful opportunity to present a complete defense, will prove grossly unjust when applied, and will create a nearly insurmountable barrier to successfully defending felony nonsupport charges, resulting in a return to the era of debtors' prisons in which indigent individuals who are not willful, recalcitrant, obdurate, or deceitful are imprisoned simply because they cannot meet their financial obligations.

1. CRIMINAL LAW — FAILURE TO PAY CHILD SUPPORT — STRICT LIABILITY — DEFENSES — IMPOSSIBILITY.

Inability to pay is not a defense to a charge under MCL 750.165, which imposes strict liability for failing to pay court-ordered child support; however, genuine impossibility is a defense under MCL 750.165 if supported by sufficient evidence; to establish impossibility, a defendant must show that he or she acted in good faith and made all reasonable efforts and used all resources at his or her disposal to comply with the support order, but could not do so through no fault of his or her own; defendants must not only establish that they cannot pay, but that theirs are among the exceptional cases in which it was not reasonably possible to obtain

the resources to pay; to determine whether a defendant has established impossibility, a court should consider whether the defendant has diligently sought employment; whether the defendant can secure additional employment, such as a second job; whether the defendant has investments that can be liquidated; whether the defendant has received substantial gifts or an inheritance; whether the defendant owns a home that can be refinanced; whether the defendant has assets that can be sold or used as loan collateral; whether the defendant prioritized the payment of child support over the purchase of nonessential, luxury, or otherwise extravagant items; and whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind; this list of factors for the court to consider is not, however, exhaustive.

2. CRIMINAL LAW — FAILURE TO PAY CHILD SUPPORT — STRICT LIABILITY — DEFENSES — IMPOSSIBILITY — JURY INSTRUCTIONS — BURDEN OF PROOF.

To be entitled to a jury instruction on the affirmative defense of impossibility to a charge of failing to pay child support under MCL 750.165, a defendant must present prima facie evidence from which the finder of fact could conclude that it was genuinely impossible for the defendant to have paid the support; a defendant who has made this threshold showing may be exonerated if the trier of fact finds that the defendant has established by a preponderance of the evidence that it was genuinely impossible for him or her to have complied with the family court order for each and every violation within the relevant charging period.

3. CRIMINAL LAW — FAILURE TO PAY CHILD SUPPORT — STRICT LIABILITY — DEFENSES — IMPOSSIBILITY — EVIDENCE.

To determine whether it was possible for a defendant to have complied with the support order giving rise to a felony charge under MCL 750.165 and evaluate the defendant's good-faith efforts, both the defense and the prosecution may rely on the record of the family court proceedings in addition to any other relevant evidence; evidence that the defendant was not truthful, hid assets, failed to accurately document the resources and assets at his or her disposal, was voluntarily unemployed or underemployed, failed to exhaust all reasonable and lawful means of generating the income necessary to satisfy the support obligation, or failed to seek timely modification of the family court order when it became evident that it could not be performed may, singly or in combination, defeat a claim that it was impossible for the defendant to comply with the support order; the family court's deter-

mination of the amount a defendant is capable of paying does not preclude a defendant from asserting impossibility as a defense to felony nonsupport.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joel D. McGormley*, Assistant Attorney General, for the people in *Likine* and *Parks*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people in *Harris*.

Bridget McCormack, *David A. Moran*, *Michael J. Steinberg*, *Kary L. Moss*, and *Williams & Connelly, LLP* (by *Frances Y. Kim*), for Selesa Likine.

State Appellate Defender (by *Douglas W. Baker*) for Michael Parks.

State Appellate Defender (by *Jacqueline J. McCann*) for Scott Harris.

Amici Curiae:

Ronald Schafer, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

Eve Brensike Primus for various criminal law professors at Michigan law schools in *Likine*.

Vivek S. Sankaran for Legal Services Association of Michigan in *Likine*.

MARY BETH KELLY, J. These three cases involve the felony of failure to pay court-ordered child support (felony nonsupport) under MCL 750.165 and the rule of

People v Adams,[1] which held that inability to pay is not a defense to this crime. We granted leave to consider the constitutionality of the Court of Appeals' ruling in *Adams* and now clarify that, while inability to pay is not a defense to felony nonsupport pursuant to MCL 750.165, *Adams* does not preclude criminal defendants from proffering the common-law defense of impossibility.

These cases require us to consider, for the first time, the nature of Michigan's felony-nonsupport statute and the proper defense to a nonsupport charge. We endorse the well-established common-law defense of impossibility as the proper defense to felony nonsupport. In doing so, we differ from the dissent both in terms of our temporal view and our sense of parents' financial priorities. Consistently with the Legislature's expressed intent in the child support statutes, we believe that to avoid conviction for felony nonsupport, parents should be required to have done everything possible to provide for their child and to have arranged their finances in a way that prioritized their parental responsibility so that the child does not become a public charge. Unlike the dissent, which would undermine the legislative choices that are reflected in the statutory child support framework, our view of parental responsibility and obligation leads us to recognize the impossibility defense. This defense differs from that advanced by the dissent because we provide guidance to the circuit courts regarding how the defense is to be adjudicated, and although a parent's ability to pay is one factor we consider, we also take other factors into account. Allowing a mere inability-to-pay defense as the dissent suggests would undermine Michigan's legislative system, which requires ability to pay to be considered in establishing the

[1] *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004).

support order in the first instance, explicitly prohibits the retroactive modification of child support orders, and makes nonsupport a strict-liability criminal offense. Our view is consistent with the plain language of Michigan's nonsupport statute and gives as much meaning as possible to the Legislature's expressed intentions, as we are required to do by our Constitution. If Michigan has placed greater priority than other states on the issue of child support as reflected in its child support laws, we are, in recognizing this defense, simply permitting the Legislature to legislate as it sees fit, in accordance with its legislative directive and in accordance with our judicial role.

I. FACTS AND PROCEDURAL HISTORY

A. *PEOPLE v LIKINE*, DOCKET NO. 141154

Defendant Selesa Arrosieur Likine (Likine) and Elive Likine (Elive) divorced in June 2003. The Family Division of the Oakland County Circuit Court (the family court) gave Elive physical custody of the parties' three children and ordered Likine to pay child support. The family court recognized Likine's "history of fairly serious mental health conditions" and her diagnosis of depressive-type schizoaffective disorder. The family court initially ordered $54 a month in child support and then raised it to $181 a month in August 2004.

Beginning in 2005, Likine failed to comply with the order requiring her to pay child support.[2] Elive sought an increase in child support payments that same year.

[2] Testimony at trial would later reveal that during the period when Likine's child support obligation was $181 a month, "[t]here was only one month in which the current support plus a little bit of arrears was paid." Likine paid no child support in 2006, and paid $488.85 in 2007. From January through March 2008, she paid a total of $100. According to Likine, she had been unemployed since September 2005, after being

The Friend of the Court (FOC) referee recommended that Likine's child support obligation be increased to $1,131 a month on the basis of the parties' testimony and evidence that she had secured two mortgages, listing income as $15,000 a month on the applications, to purchase a home worth $409,000.[3] The referee imputed income of $5,000 a month to Likine,[4] reasoning that this was the minimum income required to meet the "bare bones monthly expenses" Likine had reported.[5] After a two day hearing de novo, the family court adopted the FOC referee's recommendation in an order dated August 30, 2006.

On September 28, 2006, the family court denied Likine's motion for reconsideration in a five-page written opinion, concluding that Likine's testimony was not

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hospitalized; she had earned, at most, $19,000 a year; after January 2006, she subsisted on social security disability payments of about $600 a month.

[3] The referee noted that Likine was "very evasive[,] as she [had] been in past hearings, about the nature and source of her income." Likine also indicated that she had financed her lifestyle using credit cards and did not believe that her child support should be increased "for her poor financial decisions."

[4] MCL 552.519 establishes the state Friend of the Court Bureau and charges it with developing and providing "[g]uidelines for imputing income for the calculation of child support" by the Office of the Friend of the Court. MCL 552.519(3)(k)(*iii*). MCL 552.517b, which pertains to review of child support orders, specifies that "[t]he friend of the court office may impute income to a party who fails or refuses to provide information" to the FOC, MCL 552.17b(6)(b), and provides that "[i]f income is imputed, the recommendation shall recite all factual assumptions upon which the imputed income is based," MCL 552.517b(6)(a).

[5] The referee concluded that Likine

> either has far more income than she is trying to convince the Court she has, or, she has other sources with which to pay her living expenses. Either way, it would be patently unfair not to base child support on the income [Likine] sees fit to believe she is entitled to live on.

truthful, that her tax returns did not accurately reflect her income, and that Likine had "misrepresented her income so many times that there is no way to adequately determine her income." The family court recognized that Likine "does suffer from some form of mental illness," but the evidence presented led the court to conclude that she was "working and earning an income" because she was "maintaining herself, including the payment of a substantial mortgage." Although Likine's "actual income could not be determined due to her evasive testimony and numerous misrepresentations," the family court found that the amount of income imputed was appropriate.[6]

On March 20, 2008, the Department of Attorney General, Child Support Division, charged Likine criminally with felony nonsupport between February 1, 2005, and March 11, 2008, in violation of MCL 750.165. On September 29, 2008, the prosecutor filed a motion in limine to bar Likine from offering or referring, directly or indirectly, to her ability or inability to pay court-ordered child support, including her employment status and claims that her actual income was less than the amounts used to calculate her support obligation. Citing *Adams*,[7] the prosecutor argued that evidence of inability to pay is not a valid defense to the crime of felony nonsupport, a strict-liability crime.

At the motion hearing on October 8, 2008, Likine argued that the prosecutor was seeking to deprive her of any defense to the charge against her and that this violated her constitutional right to due process. She

[6] Likine applied for leave to appeal that ruling, but the Court of Appeals denied leave "for failure to persuade the Court of the need for immediate appellate review." *Likine v Likine*, unpublished order of the Court of Appeals, entered March 14, 2008 (Docket No. 280148).

[7] *Adams*, 262 Mich App at 89.

claimed that she had no source of income or assets from which to pay the court-ordered child support. Likine further testified that she had been unemployed since September 2005, when she was released from a month-long hospitalization; that she was disabled with schizoaffective disorder, for which she had received periodic treatment, including medication; that her sole source of income was supplemental security income (SSI) amounting to $637 a month; that she had tried to hold a part-time temporary job but was physically and mentally unable to do so; that the bank foreclosed on and "short sold" her Rochester Hills home in June 2007; and that although she had held two professional licenses, they were inactive or had lapsed and she was unable to use them because of her credit rating and her disability. According to Likine, she had been able to pay $181 a month in child support in 2004 because that amount was based on her actual income. Likine provided the circuit court with a copy of her social security earnings record covering 1985 through 2003, which showed no income from 1994 through 2002.[8] On October 21, 2008, the circuit court issued a written order granting the prosecutor's motion in limine.

At the jury trial in November 2008, the prosecutor presented the testimony of Elive and an FOC child-support-account specialist. The specialist testified that the child support order entered when Likine and Elive divorced required Likine to pay $35 a month for one child and $48 a month for two. The amount was subsequently increased, in August 2004, to $181 a month. For the period subject to the felony-nonsupport charge, February 2005 through March 2008, the amount of support ordered was initially $181 a month, but in June 2005 it was raised to

[8] Likine also informed the court that another motion to modify was pending before the FOC referee who had issued the April 2006 report.

$1,131 a month. The specialist testified that Likine had made very sporadic payments, including payments in only 12 of the 37 months charged, in amounts ranging from $100 to $281.

Elive also testified that Likine's child support payments were "very sporadic," stating that she only paid child support "when the Friend of the Court threatened her or they sent her a note." Elive testified that Likine had told him that he "would suffer with those kids" by himself and that Likine had said she would "not [pay] any child support" because "women don't pay child support." He stated that he sought an increase in the child support amount in June 2005 after Likine purchased a half-million-dollar home in Rochester Hills.[9]

Likine testified on her own behalf. She stated that she was able to pay both the $54 a month that was initially ordered and the $181 monthly amount, but when the support amount was increased to $1,131, she was unable to make the payment. She acknowledged that she had purchased the home in Rochester Hills, but stated that the house "was put in [her] name" and that her boyfriend had paid for it. In closing, defense counsel argued that the amount of Likine's child support had effectively been "made up" by using imputed income as the basis for calculation and that "the child support should not have been in the amount of $1,131." Counsel further argued that Likine was "being torn apart by factors she [had] no control over."

The jury found Likine guilty as charged. Likine moved for relief from the judgment or for reconsideration, arguing that MCL 750.165 should be declared unconstitutional or, alternatively, that the order granting the prosecutor's

[9] Elive also testified that Likine had purchased a new vehicle around the time that she bought the house. Likine testified that she had turned in a leased vehicle and acquired another leased vehicle.

motion in limine should be reconsidered and vacated so that Likine could offer a defense to the charge. The circuit court denied the motion "for the reasons first stated upon the record October 8, 2008 and that this matter is a strict liability offense." Subsequently, the circuit court sentenced Likine to probation for one year with 48 days' credit and stated that the family court would determine the amount of restitution.

In February 2009, Likine filed a claim of appeal, and in March 2009, through appellate counsel, she also moved for a new trial in the circuit court. Likine argued that her rights under the Michigan Constitution's Due Process Clause were violated when she was not allowed to present evidence of her inability to pay as a defense to the criminal charge of felony nonsupport.[10] The circuit court denied the motion on the record, citing *Adams*[11] for the rule that inability to pay is not a defense to this strict-liability offense.

The Court of Appeals affirmed, holding, in part, that Likine's "argument is actually an impermissible collateral attack on the underlying support order."[12] The Court of Appeals concluded that defendant's right to due process had not been violated because felony nonsupport is a strict-liability offense, so evidence of her inability to pay was not relevant.

We granted leave, with *People v Parks* and *People v Harris*, to consider whether the rule of *Adams*, which held that inability to pay is not a defense to the charge

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[10] Likine's motion for a new trial characterized her argument as pertaining to an "ability to pay" defense. However, the motion itself, and her brief in support of the motion, cite this Court's ruling in *Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889), and assert that it was "impossible" for her to fulfill her support obligation.

[11] *Adams*, 262 Mich App at 99-100.

[12] *People v Likine*, 288 Mich App 648, 654; 794 NW2d 85 (2010).

of felony nonsupport under MCL 750.165, is constitutional.[13]

B. *PEOPLE v PARKS*, DOCKET NO. 141181

Defendant Michael Joseph Parks (Parks) and his wife Diane Parks (Diane) divorced in September 2000. Defendant, an orthopedic surgeon, was a rural physician with a solo practice who sometimes worked as a contract physician. The Ingham family court initially ordered defendant to pay $230 a week in child support for the parties' three children. On August 19, 2003, the family court modified Parks's support obligation to $761 a week. That obligation was in effect throughout the criminal proceeding in this case.

Parks was charged criminally with violating MCL 750.165 for failing to pay child support from October 1, 2006, through July 15, 2008. At a bench trial in January 2009, Diane testified that Parks had made no support payments during the period charged. She testified that during that time, Parks had made several requests for a reevaluation of his child support obligation and that there had been a hearing before the family court at which Parks was represented by counsel. After this hearing, the family court denied Parks's request because he had failed to provide any documentation to substantiate his claim that he could not meet his child support obligation.

An Ingham County FOC officer testified at the trial. The officer testified that Parks had made no child support payments from October 2006 to July 2008 and that the FOC had tried to enforce Parks's child support obligation by initiating show-cause hearings and obtaining income-withholding orders and bench warrants

[13] *People v Likine*, 488 Mich 955 (2010).

for Parks's arrest. As of the date of the trial, none of these attempts had been successful. Parks's child support arrearage amounted to more than $262,000.

Parks testified that the FOC improperly imputed to him the income of an urban physician in a group practice, whereas his income as a rural sole practitioner was "considerably lower."[14] Also, Parks testified that probation conditions imposed by a federal court hampered his ability to practice medicine[15] and thereby impaired his ability to pay child support. Parks further testified that he was currently disabled,[16] was receiving disability benefits from the federal government, and had declared bankruptcy in 2005. Parks testified that he "believe[d]" that he had made child support payments between October 2006 and July 2008. When asked to provide documentation, Parks produced a report from the child support enforcement system that he evidently thought would reflect that he had made payments, but the court examined the report and noted that it showed "all zeroes," indicating that he had paid no child support in or after October 2006.

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[14] While the prosecutor argued that inability to pay was not a defense pursuant to *Adams*, the trial court did not curtail Parks's testimony, indicating that because it was a bench trial and the judge understood the law, Parks's testimony regarding his improperly imputed income made no difference.

[15] Defense counsel admitted into evidence a March 2005 order of the United States District Court for the Western District of Michigan amending Parks's 2003 judgment in a criminal case. The amended judgment sentenced Parks to 90 days' imprisonment for violating the terms of his federal probation that required him to "pay child support in accordance with his court-ordered schedule of payments" and to "support his dependents and meet other family responsibilities." In addition to serving 90 days' imprisonment, Parks was required to pay restitution in the amount of $28,623.34 to the Ingham County Friend of the Court within six months after the date of the amended judgment.

[16] According to a motion Parks filed in the Court of Appeals, he suffers from carpal tunnel syndrome in both hands.

At the close of trial, the prosecutor argued that each of the three elements necessary to convict Parks of violating MCL 750.165 had been established: that Parks was ordered to pay child support, that he was either personally served or appeared in the underlying matter, and that he had failed to pay the ordered amount. Defense counsel argued that Parks "did all that he could to comply" with his child support obligation and was "doing what he could to reestablish his practice." Defense counsel urged that Parks's child support payments be "adjusted." The circuit judge explained that he did not adjust child support obligations because, as a circuit judge presiding over criminal matters, he was not authorized to adjust support orders, which are subject to the authority of the family court. The circuit judge found defendant guilty as charged, stating that it was "obvious" that considering "the number of times Mr. Parks has refused to pay over the years, including the period of time in question here, . . . Mr. Parks has no real desire to comply with what the law says he is supposed to do" and that "Mr. Parks simply does not want to pay."

At sentencing, Diane stated that it was "very difficult to raise three kids without support," that all three children "have been working since the age of 16 to help support the house and themselves," and that she was taking only half of her multiple sclerosis medicine "to cut back in whatever ways" she could. Alexis Parks, defendant's daughter, also made a statement, asking that Parks be incarcerated because "the only way he's ever paid is when he was in jail." Parks was ordered to pay restitution in the amount of $234,444.83 and sentenced to 5 years' probation and one year in jail with credit for 205 days served, which would be suspended if he paid a portion of the restitution.

Parks appealed by right, and on April 20, 2010, the Court of Appeals affirmed in an unpublished opinion per curiam.[17] The Court of Appeals noted that Parks had not raised the defense of inability to pay in circuit court and so reviewed the claim as an unpreserved constitutional issue. The Court of Appeals relied on *Adams* to conclude that Parks could be found guilty of violating MCL 750.165 with no finding of intent or knowledge because the statute imposes strict liability and inability to pay is not a defense to a charge of felony nonsupport.

We granted leave, with *Likine* and *Harris*, again to consider whether the rule of *Adams* is constitutional.[18]

C. *PEOPLE v HARRIS*, DOCKET NO. 141513

Defendant Scott Bennett Harris (Harris) and Lavonne Harris (Lavonne), divorced in November 2003. The Muskegon family court initially ordered Harris to pay $139 a month for his two children, and the amount was subsequently increased to $612 a month in 2006. Harris, who was living in Key West, Florida, was charged with felony nonsupport as a fourth-offense habitual offender for failing to pay his court-ordered child support between April 4, 2003, and May 7, 2008. Harris's child support arrearage amounted to nearly $13,000.

On September 25, 2008, Harris pleaded guilty as charged in exchange for a fairly complex sentencing agreement pursuant to *People v Cobbs*.[19] The Muskegon Circuit Court agreed that sentencing would be delayed

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[17] *People v Parks*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket No. 291011).

[18] *People v Parks*, 488 Mich 955 (2010).

[19] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

by two months (until December 8, 2008) and that if Harris paid $3,000 of the child support arrearage, sentencing would be delayed until May 2009. If Harris paid another $5,000 on the arrearage by May 2009, the circuit court agreed that it would not sentence him to any type of incarceration, although he would still be subject to the imposition of probation, fines, costs, and tethering. The circuit court stressed, however, that Harris would "need to stay current" in his support obligations in addition to paying the arrearage. After Harris agreed to the conditions, the circuit court accepted his guilty plea and permitted Harris to return to his home in Florida.

On December 8, 2008, Harris appeared before the circuit court for sentencing. At that time Harris had paid $1,500, roughly the amount of his ongoing child support payments, but he acknowledged that he had not paid any amount of the arrearage. His counsel argued that if Harris were permitted to remain free, Harris "would be able to raise a substantial sum." Defense counsel stated that defendant "want[ed] to try to comply," but that he was indigent, as evidenced by the court's having appointed counsel for him in the criminal proceeding. On allocution, defendant stated only that he had a back problem of 10 years' duration, and his lawyer added that Harris had "heart problems."

Lavonne asserted in her victim impact statement that Harris had told her on several occasions that she would "never see another dime from him regarding [the] two children." She recalled that defendant refused to provide any assistance with uncovered medical expenses when their son broke his hand and indicated that she could not afford to buy their son winter clothes because she could not "get any help from their father." She acknowledged that Harris had a back problem but

was unaware that he had any heart problem. She stated: "He has an addiction problem to alcohol and drugs, is what he has. He has a problem with working." Harris was sentenced as a fourth-offense habitual offender to a prison term of 15 months to 15 years. The circuit court ordered costs and restitution of $12,781.39, the amount of the child support arrearage.

Through appointed counsel from the State Appellate Defender Office (SADO), Harris moved to withdraw his plea or for resentencing. At the hearing on August 10, 2009, the circuit court heard extensive argument, including Harris's claim that had he been permitted to do so, he would have testified that he had tried to generate income but could not because of his health conditions. The circuit court denied the motion in an opinion and order dated August 21, 2009. The circuit court stated that it was bound by *Adams* to apply MCL 750.165 as a strict-liability statute and that Harris also could not claim error based on the court's failure to consider his alleged indigency because Harris had agreed to the sentence agreement.[20]

On June 4, 2010, the Court of Appeals denied Harris's delayed application for leave to appeal for lack of merit.[21] Harris, still represented by SADO, sought leave to appeal in this Court, challenging the constitutionality of MCL 750.165.

We granted leave in this case, with *Likine* and *Parks*, to consider whether the rule of *Adams* is constitu-

[20] In addition, the circuit court concluded that it was not improper for that court to adopt the arrearage as the restitution amount and requested supplemental briefing on Harris's challenge to the scoring of offense variable 9 (number of victims). The circuit court upheld the scoring in an opinion and order dated December 2, 2009. Harris filed a motion for rehearing, which the circuit court denied on March 5, 2010.

[21] *People v Harris*, unpublished order of the Court of Appeals, entered June 4, 2010 (Docket No. 297182).

tional.[22] In addition, we granted leave in this case to consider whether the circuit court abused its discretion when it denied Harris's postsentencing motion to withdraw his plea and whether the circuit court erred when it adopted the family court's determination of the child-support-arrearage amount as the restitution to be imposed in this criminal case or whether Harris had waived that issue.

II. STANDARD OF REVIEW

These cases involve interpretation of a statute, a question of law that we review de novo on appeal.[23] The primary goal of statutory interpretation is to give effect to the intent of the Legislature.[24] The first step is to review the language of the statute itself.[25] If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible.[26] We review de novo constitutional issues.[27]

III. ANALYSIS

All defendants argue that the circuit courts denied their constitutional right to due process when they refused to consider evidence of defendants' "inability to pay" as a defense to the charge of felony nonsupport.

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[22] *People v Harris*, 488 Mich 955 (2010).

[23] *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

[24] See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993).

[25] *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993).

[26] *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

[27] *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).

Only Likine explicitly equated her alleged inability to pay with a claim of impossibility.

A. MCL 750.165

To evaluate defendants' arguments, we must first consider the relevant statute, MCL 750.165.[28] The op-

[28] The statute provides, in its entirety:

(1) *If the court orders an individual to pay support* for the individual's former or current spouse, or *for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony* punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both.

(2) This section *does not apply unless* the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued.

(3) Unless the individual deposits a cash bond of not less than $500.00 or 25% of the arrearage, whichever is greater, upon arrest for a violation of this section, the individual shall remain in custody until the arraignment. If the individual remains in custody, the court shall address the amount of the cash bond at the arraignment and at the preliminary examination and, except for good cause shown on the record, shall order the bond to be continued at not less than $500.00 or 25% of the arrearage, whichever is greater. At the court's discretion, the court may set the cash bond at an amount not more than 100% of the arrearage and add to that amount the amount of the costs that the court may require under section 31(3) of the support and parenting time enforcement act, 1982 PA 295, MCL 552.631. The court shall specify that the cash bond amount be entered into the L.E.I.N. If a bench warrant under section 31 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.631, is outstanding for an individual when the individual is arrested for a violation of this section, the court shall notify the court handling the civil support case under the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650, that the bench warrant may be recalled.

(4) The court may suspend the sentence of an individual convicted under this section if the individual files with the court a bond in the amount and with the sureties the court requires. At a minimum, the bond must be conditioned on the individual's compliance with the support order. If the court suspends a sen-

erative language of the statute provides that "[i]f the court orders an individual to pay support . . . for a child of the individual, and the individual does not pay the support . . . , the individual is guilty of a felony . . . ."[29]

B. *PEOPLE v ADAMS* AND MCL 750.165

In *People v Adams*, the defendant father, charged with felony nonsupport under MCL 750.165, sought to introduce evidence of his inability to pay as a defense to the charge. The circuit court permitted the defense, but the Court of Appeals reversed, holding that inability to pay is not a defense to felony nonsupport. To reach this conclusion, the Court of Appeals compared the current statutory language of MCL 750.165 with the statute's language before its amendment in 1999.[30] Before this amendment, the statute provided in relevant part:

> Where in any decree of divorce . . . the court shall order [a] husband to pay any amount to the clerk or friend of the court for the support of any wife or former wife . . . or father to pay any amount to the clerk or friend of the court

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> tence under this subsection and the individual does not comply with the support order or another condition on the bond, the court may order the individual to appear and show cause why the court should not impose the sentence and enforce the bond. After the hearing, the court may enforce the bond or impose the sentence, or both, or may permit the filing of a new bond and again suspend the sentence. The court shall order a support amount enforced under this section to be paid to the clerk or friend of the court or to the state disbursement unit.
>
> (5) As used in this section, "state disbursement unit" or "SDU" means the entity established in section 6 of the office of child support act, 1971 PA 174, MCL 400.236. [MCL 750.165 (emphasis added).]

[29] MCL 750.165(1).

[30] After *Adams* was decided, 2004 PA 570 further amended MCL 750.165 to add subsection (3), which concerned cash bonds deposited by a defendant, see note 28 of this opinion, but that amendment would not have affected the *Adams* analysis and does not affect our analysis here.

> for the support of [a] minor child or children, and said husband or father *shall refuse or neglect to pay* such amount at the time stated in such order *and shall leave the state* of Michigan, *said husband or father shall be guilty of a felony* . . . .[31]

Comparing the two versions of the statute, the Court of Appeals concluded that the current version of MCL 750.165, which did not have the language "shall refuse or neglect," contains no fault or intent element. Noting that the omission of language expressly requiring fault as an element did not end the court's inquiry, the *Adams* Court focused on whether the Legislature intended to require fault as a predicate to guilt.[32] Examining caselaw recognizing inability to pay as a defense to a charge under the earlier version of the statute,[33] the Court noted that the cases had "implied a criminal intent requirement into the statute."[34] The *Adams* Court rejected the applicability of that analysis to the language of the current statute:

> [I]n the current amended statute, in addition to deleting gender-specific references such as "husband" and "father" and the requirement that the person leave the state, the Legislature removed any reference to the individual's re-

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[31] MCL 750.165, as amended by 1939 PA 89 (emphasis added).

[32] *Adams*, 262 Mich App at 93. The Court listed "numerous factors that may be considered in deciphering this intent," including:

> (1) whether the statute is a codification of common law; (2) the statute's legislative history or its title; (3) guidance to interpretation provided by other statutes; (4) the severity of the punishment provided; (5) whether the statute defines a public-welfare offense, and the severity of potential harm to the public; (6) the opportunity to ascertain the true facts; and (7) the difficulty encountered by prosecuting officials in proving a mental state. [*Id*. at 93-94 (citations omitted).]

[33] *Id*. at 94-98.

[34] *Id*. at 96, discussing *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977).

> fusal or neglect to pay the support. Given the Legislature's deletion of language relating to refusal or neglect, there is no longer wording in the statute that could be used to support a construction that would include a mens rea requirement. . . . Thus, an intent requirement cannot be implied in the absence of any language supporting such an interpretation.[35]

Adams recognized that the current version of the statute imposes criminal liability regardless of intent with the goal of ensuring protection of the public welfare, stating: "Criminal nonsupport is the type of crime that generally falls within the class of crimes for which no criminal intent is necessary. A law that requires a parent to support his child benefits not only the child but also the well-being of the community at large."[36]

We agree with the Court of Appeals' conclusion in *Adams* that MCL 750.165 imposes strict liability. Although strict-liability offenses are disfavored, there is no question that the Legislature may create such offenses without running afoul of constitutional concerns.[37] Consistently with *Adams*, we have stated that strict-liability crimes "regulate[] conduct under the state's police power to promote the social good, a course the Legislature may elect without requiring mens rea,"[38] which is a particular state of mind that the prosecution must prove the defendant had in order to secure a conviction.[39] In addition, we have recognized that "courts will infer an element of criminal intent

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[35] *Adams*, 262 Mich App at 96.

[36] *Id*. at 99.

[37] See *Lambert v California*, 355 US 225; 78 S Ct 240; 2 L Ed 2d 228 (1957); see also *Smith v California*, 361 US 147, 150; 80 S Ct 215; 4 L Ed 2d 205 (1959), and *People v Rice*, 161 Mich 657, 664; 126 NW 981 (1910).

[38] *People v Quinn*, 440 Mich 178, 187; 487 NW2d 194 (1992).

[39] See Black's Law Dictionary (7th ed).

when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed."[40] We agree with the holding in *Adams* that the revised language of MCL 750.165 evinces a clear legislative intent to dispense with the *mens rea* element and impose strict liability by eliminating the language regarding a defendant's "refus[al] or neglect" to pay the ordered support, and instead providing simply that if "the individual *does not pay* the support . . . the individual is guilty of a felony."

C. COMMON-LAW DEFENSE OF IMPOSSIBILITY

Concluding that MCL 750.165 is a strict-liability offense, however, does not end our analysis. The *Adams* Court only addressed the defense of inability to pay and did not address the common-law defense of impossibility, which if proven negates the *actus reus* of a crime.[41]

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[40] *People v Kowalski*, 489 Mich 488, 499 n 12; 803 NW2d 200 (2011), citing *People v Tombs*, 472 Mich 446, 452-456; 697 NW2d 494 (2005); *United States v X-Citement Video, Inc*, 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994); *Staples v United States*, 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994); and *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952).

[41] However, we note that legal commentators have specifically discussed *Adams*, emphasizing the voluntary-act requirement in criminal law and the requisite possibility of performance in crimes of omission:

> It is axiomatic that crimes consist of a mental part (*mens rea*) and a physical part (the requirement of a voluntary act, or a failure to act when there was a duty to do so). It is possible, however, for a legislature to dispense with a *mens rea* requirement. . . .
>
> Nonetheless, [*Adams*] is more correctly framed as a voluntary act case rather than a mens rea case. An involuntary act—or an involuntary failure to act when there was a duty to do so—has never before been subject to punishment in American law. Indeed, more than 100 years ago the Michigan Supreme Court addressed this very issue, and concluded possibility of performance is an essential element in a failure-to-act offense. No one can be held

Generally, the commission of a crime requires both an *actus reus* and a *mens rea*.[42] Though a strict-liability crime includes no *mens rea* element, the *actus reus*, or wrongful act, remains an element of the crime.[43] Specifically, a strict-liability offense requires the prosecution to prove beyond a reasonable doubt that the defendant committed the prohibited act, regardless of the defendant's intent and regardless of what the defendant actually knew or did not know.[44]

A defendant might defend against a strict-liability crime by submitting proofs either that the act never occurred or that the defendant was not the wrongdoer. Additionally, at common law, a defendant could *admit* that he committed the act, but defend on the basis that the act was committed involuntarily.[45] Examples of involuntary acts that, if proved, provide a defense against the *actus reus* element of a crime include

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criminally liable because of a bodily movement which is involuntary. Nor can one be held criminally liable for failing to perform an act which one is incapable of performing. [Apol & Studnicki, *Annual survey of Michigan law: June 1, 2003 - May 31, 2004: Criminal law*, 51 Wayne L R 653, 673-674 (2005), citing *Jenkinson*, 77 Mich 414 (1889).]

[42] See, e.g., *Morissette*, 342 US at 251 (noting American courts' early recognition of crime "as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"); see also 4 Blackstone, Commentaries on the Laws of England, p *20, (stating that "to constitute a crime against human laws, there must be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will").

[43] The *actus reus* is "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability[.] Black's Law Dictionary (8th ed).

[44] *Quinn*, 440 Mich at 188.

[45] See, e.g., *People v Freeman*, 61 Cal App 2d 110; 142 P2d 435 (1943) (finding no voluntary act when the defendant, after experiencing an epileptic seizure, became unconscious while driving, causing a fatal collision); *State v Hinkle*, 200 W Va 280, 282, 285-286; 489 SE2d 257 (1996) (finding no voluntary act when defendant lost consciousness while driving because of an undiagnosed brain disorder, causing a collision).

reflexive actions,[46] spasms, seizures or convulsions,[47] and bodily movements occurring while the actor is unconscious or asleep.[48] The common thread running through these "involuntariness" defenses is that the act does not occur under the defendant's control, and thus the defendant was powerless to prevent its occurrence and cannot be held criminally liable for the act.[49]

MCL 750.165, however, criminalizes an omission, or a failure to act. At common law, an established defense to a crime of omission is *impossibility*.[50] Like its coun-

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[46] See *People v Newton*, 8 Cal App 3d 359, 373; 87 Cal Rptr 394 (1970) (discussing loss of consciousness and "reflex shock condition" after the defendant sustained an abdominal gunshot wound).

[47] See, e.g., *State v Welsh*, 8 Wash App 719, 722-723; 508 P2d 1041 (1973) (stating, with regard to the element of intent, that there is no criminal liability for an unconscious act and explaining that "during a psychomotor seizure, a person is not conscious of his behavior; his actions are automatic").

[48] See 1 LaFave & Scott, Substantive Criminal Law (2d ed), § 6.1(c), p 429; *State v Mishne*, 427 A2d 450, 455-57 (Me, 1981) (construing an intentional act as requiring awareness and consciousness); cf. *People v Decina*, 2 NY2d 133, 137-140; 157 NYS2d 558; 138 NE2d 799 (1956) (finding a voluntary act when the defendant, knowing he might, at any time, be subject to epileptic attacks and seizures, drove an automobile with nobody accompanying him, suffered a seizure, and caused a fatal collision).

[49] See 1 LaFave & Scott, § 6.1(c), p 429; see also Simester, *On the so-called requirement for voluntary action*, 1 Buff Crim L R 403, 419 (1998):

> [I]t may be helpful to consider what philosophers have had to say about voluntariness. In fact, there is surprisingly little analysis in the literature. Moreover, the existing analysis is not always of the same concept. One approach is to explain voluntariness as the opposite of involuntariness . . . . An alternative account is of voluntary behavior as *volitional* action—behavior which is intentional under some description, which is "done because the agent wants to do it." [Citation omitted.]

[50] See, e.g., *Willing v United States*, 4 US (4 Dall) 374, 376; 1 L Ed 872 (1804) (ruling in favor of defendants, who had argued in the district court that " 'the law does not compel parties to impossibilities (*lex non cogit ad*

terpart, involuntariness, the centuries-old defense of impossibility derives from the English common-law courts.[51] For example, in 1843, the Queen's Bench considered a defendant's liability for failing to repair a portion of highway that had been rendered impassable when the surrounding sea encroached. The Chief Judge stated:

> Both the road which the defendant is charged with liability to repair, and the land over which it passes, are washed away by the sea. To restore the road, as [the defendant] is required to do, he must create a part of the earth anew. . . . here all the material of which a road could be made have been swept away by the act of God. Under those circumstances can the defendant be liable for not repairing the road? We want an authority for such a proposition; and none has been found.[52]

The Queen's Bench, then, recognized impossibility of performance as a defense to a charge involving an omission.[53] Like the involuntariness defense to crimes

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impossibilia)' "); *Stockdale v Coulson*, 3 All ER 154 (1974) (allowing appeal and quashing conviction after finding that it was impossible for a company's director and secretary to comply with a statutory requirement to attach documents that did not exist); *Regina v Hogan*, 169 ER 504, 505; 2 Den 277 (1851) (noting that in order to convict a parent of neglect, it must be shown that the parent "had the means of supporting [the child].")

[51] Recognizing the roots of impossibility in early common law, Chief Justice Edward Coke stated in *Dr Bonham's Case*, 8 Co Rep 113b, 118a; 77 Eng Rep 646 (1610), that "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void."

[52] *Regina v Bamber*, 5 QB 279, 287; 114 ER 1254 (1843) (comment by Denman, C.J.). Judge Wightman noted that there had been "no allegation on the record that [the defendant's] duty [was] to keep the sea out." *Id.* at 286.

[53] See *The Generous*, 2 Dods 322, 323 (1818), in which Sir William Scott stated, "But the law itself, and the administration of it, must yield to that to which every thing must bend — to necessity. The law, in its most

that penalize an affirmative act, the defense of impossibility to crimes that penalize an act of omission must be based on something outside the defendant's control:

> Obviously, the involuntariness of omissions cannot be explained in precisely the same way as for actions. It would be odd indeed to talk of a reflex or convulsive omission. Nonetheless, even for omissions the criminal law requires that [a defendant] must be responsible for her behavior before she commits the actus reus of a crime. [The defendant's] omission is involuntary, and her responsibility for the actus reus is negated, when she fails to discharge a duty to intervene because it was *impossible* for her to do so.[54]

Stated differently, a defendant cannot be held criminally liable for failing to perform an act that was impossible for the defendant to perform.[55] When it is genuinely *impossible* for a defendant to discharge a duty imposed by law, the defendant's failure is excused.[56]

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positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration of law must adopt that general exception in the consideration of all particular cases." See also *In re Bristol and N S R Co*, 3 QBD 10, 13 (1877) (declining to issue a writ of mandamus to enforce a statutory duty that was "impossible" for the railway to discharge because doing so "would be contrary to the elementary principles of justice") (comment of Cockburn, C.J.).

[54] Simester, 1 Buff Crim L R, p 417.

[55] 1 LaFave & Scott, § 6.2(c), p 446 (recognizing the defense, but emphasizing that "impossibility means impossibility"); see also *United States v Spingola*, 464 F2d 909, 911 (CA 7, 1972) (holding that "[g]enuine impossibility is a proper defense to a crime of omission").

[56] See Williams, Criminal Law: The General Part (2d ed), § 240, p 747 (stating that "[i]t may be laid down as a general proposition that where the law imposes a duty to act, non-compliance with the duty will be excused where compliance is physically impossible"). We first recognized that impossibility is a defense to a strict-liability crime 123 years ago in *Jenkinson*, 77 Mich 414, a discussion of which follows.

Michigan common law, which has its roots in the English common law, has also long recognized impossibility as a defense to crimes of omission. In *Port Huron v Jenkinson*,[57] this Court considered a city ordinance that criminalized a property owner's failure to repair sidewalks running adjacent to his or her property if the city requested the property owner to make the repair. *Jenkinson* recognized impossibility as a defense, holding that the defendant could not be criminally convicted of failing to perform a legally required duty when it was impossible for him to do so. The Court in *Jenkinson* stated:

> *No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his nonperformance of such a duty a crime, for which he may be punished by both fine and imprisonment.* It needs no argument to convince any court or citizen, where law prevails, that this cannot be done; and yet such is the effect of the provisions of the statute and by-law under consideration. It will readily be seen that a tenant occupying a house and lot in the city of Port Huron, and so poor and indigent as to receive support from his charitable neighbors, if required by the city authorities to build or repair a sidewalk along the street in front of the premises he occupies, and fails to comply with such request, such omission becomes criminal; and, upon conviction of the offense, he may be fined and imprisoned. It is hardly necessary to say these two sections of the statute are

[57] *Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889); see also *Benton Harbor v St Joseph & B H Street R Co*, 102 Mich 386, 390-391; 60 NW 758 (1894) (recognizing impossibility as a defense when the respondent "cannot procure funds" to pave within its rails and the roadway, as required by ordinance; "that it is an utter impossibility to do what it is asked to have done; that it cannot pay [its] current expenses; and . . . that a writ of *mandamus* will not issue to compel the performance when it is apparent that the parties against whom it is to be directed have no power to comply therewith").

> unconstitutional and void, and that the provisions are of no force or effect. They are obnoxious to our Constitution and laws; and the two sections of the statute are a disgrace to the legislation of the State.[58]

The Court specifically held that a legislative body cannot require a person to perform an act that "is impossible for him to perform" and then impose criminal penalties for the failure to perform that act.[59] *Jenkinson*, then, recognized common-law impossibility as a defense to a criminal omission.

D. IMPOSSIBILITY AS A DEFENSE TO FELONY NONSUPPORT

The language of MCL 750.165 provides no indication that the Legislature intended to abrogate common-law impossibility as a defense to felony nonsupport.[60] Consistently with the Michigan Constitution and absent a clear legislative intent to abolish the common law, we thus presume that the common-law defense of impossibility remains available if supported by sufficient evidence.[61] Accordingly, we hold that genuine impossibility is a defense to the charge of felony nonsupport under

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[58] *Jenkinson*, 77 Mich at 419-420 (emphasis added).

[59] *Id.* at 419.

[60] The Michigan Constitution provides that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7.

[61] *People v Dupree*, 486 Mich 693, 705-706; 788 NW2d 399 (2010). The operative language of MCL 750.165(1), which states that "[i]f the court orders an individual to pay support . . . for a child of the individual, and the individual does not pay the support . . . , the individual is guilty of a felony," reflects no intent to abrogate the traditional common-law defense of impossibility. Our decision in *Jenkinson* and the common-law principles recognizing the defense of impossibility form the matrix within which the Legislature enacted MCL 750.165 given that " 'the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation.' " *People v Lowe*, 484 Mich 718, 729; 773 NW2d 1

MCL 750.165.[62] Just as a defendant cannot be held criminally liable for committing an act that he or she was powerless to prevent, so, too, a defendant cannot be held criminally liable for failing to perform an act that was genuinely *impossible* for the defendant to perform.

Although English and Michigan common law both recognize that impossibility may be raised as a defense to a crime of omission, neither provides any particularized guidance regarding the quantum of evidence necessary to establish impossibility. These common-law cases establish impossibility as a defense in cases in which a defendant was genuinely unable to perform a legally required act or, as in the English case involving restoration of a road washed away by the sea, when compliance was physically impossible. However, "it is somewhat surprising to find that if impossibility in the modern context is examined more closely, its position is confused and its function unclear."[63]

In considering the parameters of the impossibility defense, we find instructive the United States Supreme Court's decision in *Bearden v Georgia*,[64] which considered the constitutionality of revoking a criminal defendant's probation for failure to pay a fine. In *Bearden*, the petitioner was ordered to pay a $500 fine and $250 in restitution as conditions of his probation.[65] He was

(2009), quoting *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006).

[62] At oral argument, the Attorney General conceded that the common-law defense of impossibility remained available to a defendant charged with felony nonsupport but stated that none of these defendants "come[s] even close" to establishing impossibility.

[63] Smart, *Criminal responsibility for failing to do the impossible*, 103 L Q R 532, 533 (1987).

[64] *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983).

[65] *Id*. at 662.

then laid off from his job and, despite repeated efforts, was unable to find other work. When the petitioner's remaining payments were late, the state revoked his probation because he had not paid the balance. The record from the probation-revocation hearing indicated that the petitioner had been unable to find employment and had no assets or income.[66] The Court held that if a fine is determined to be the appropriate penalty for a crime, the state cannot "imprison a person solely because he lacked the resources to pay it."[67] Rather, there must be "evidence and findings that the defendant was somehow responsible for the failure . . . ."[68] *Bearden* directed sentencing courts to consider the reasons for nonpayment and carefully "inquire into the reasons for the failure to pay":[69]

> This distinction, based on the reasons for nonpayment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. *Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution* may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense.[70]

Bearden indicated that "if the probationer has made *all reasonable efforts to pay* the fine or restitution, and yet cannot do so *through no fault of his own*, it is fundamentally unfair to revoke probation automati-

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[66] *Id*. at 662-663.

[67] *Id*. at 667-668.

[68] *Id*. at 665.

[69] *Id*. at 668, 672.

[70] *Id*. at 668-669 (emphasis added; citations omitted).

cally . . . ."[71] The Court held that a "*lack of fault* provides a 'substantial reason which justifies or mitigates the violation' and makes revocation inappropriate."[72]

We recognize that the Court in *Bearden* dealt with probation revocation for nonpayment of a fine, as opposed to the felony nonsupport at issue in this case, but we are guided by the Court's reasoning, which inquires into and considers an individual's efforts to make a legally required payment. Thus, we hold that to establish an impossibility defense for felony nonsupport, a defendant must show that he or she acted in good faith and made *all reasonable efforts* to comply with the family court order, but could not do so through no fault of his or her own. In our view, "sufficient bona fide efforts to seek employment or borrow money in order to pay" certainly are expected, but standing alone will not necessarily establish an impossibility defense to a charge under MCL 750.165. Instead, defendants charged with felony nonsupport must make *all reason-*

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[71] *Id*. at 668.

[72] The formulation articulated in *Bearden* is largely consistent with *The Generous*, 2 Dods at 323-324:

> [T]he nature of the necessity pleaded [must] be such as the law itself would respect; for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controuling, is of that nature.

Moreover,

> the party who was so placed [must have] used all practicable endeavours to surmount the difficulties which already formed that necessity, and which on fair trial he found insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. [*Id*. at 324.]

able efforts, and use all resources at their disposal, to comply with their support obligations. For the payment of child support to be truly impossible, a defendant must explore and eliminate all the reasonably possible, lawful avenues of obtaining the revenue required to comply with the support order. Defendants must not only establish that they cannot pay, but that theirs are among the exceptional cases in which it was not reasonably *possible* to obtain the resources to pay. A defendant's failure to undertake those efforts reflects "an insufficient concern for paying the debt"[73] one owes to one's child, which arises from the individual's responsibility as a parent.

To determine whether a defendant has established impossibility in the context of a felony nonsupport case, we provide, for illustrative purposes only, a nonexhaustive list of factors for courts to consider.[74] These should include whether the defendant has diligently sought employment; whether the defendant can secure additional employment, such as a second job; whether the defendant has investments that can be liquidated; whether the defendant has received substantial gifts or an inheritance; whether the defendant owns a home that can be refinanced; whether the defendant has assets that can be sold or used as loan collateral; whether the defendant prioritized the payment of child support over the purchase of nonessential, luxury, or otherwise extravagant items; and whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind, in accor-

[73] *Id*.

[74] Relevant to this inquiry is the defendant's conduct at the family court proceedings, including providing appropriate documentation, and compliance with the family court's order, which we will discuss later in this opinion.

dance with one's parental responsibility to one's child.[75] The existence of unexplored possibilities for generating income for payment of the court-ordered support suggests that a defendant has not raised a true impossibility defense, but merely an assertion of inability to pay. A defendant's failure to explore every reasonably possible avenue in order to pay his or her support obliga-

[75] This list is not intended to be exhaustive or exclusive, but instead sets forth factors that courts may use to consider whether a defendant charged under MCL 750.165 has presented evidence that might demonstrate genuine impossibility. We emphasize that the factfinder's inquiry into the basis for an impossibility claim is broader in scope than that necessitated by a mere claim of "inability to pay." Inability to pay may be an evidentiary factor that can be used in support of an impossibility defense, but, standing alone, it is insufficient to show impossibility. For example, evidence that is corroborated or documented, by whatever means may be available, that the defendant has exhausted all of his or her monetary resources, does not possess (or has been unable to find a buyer for or lender against) assets that could be sold or pledged to obtain the means to satisfy the support obligation, and has made all reasonable efforts to secure employment to satisfy the support obligation may, in the absence of persuasive contradictory evidence, satisfy the strict requirements of the impossibility defense we recognize here.

To provide an illustration of an extreme example, in our view, a person who was unexpectedly hospitalized or underwent emergency surgery may be able to meet the exacting standard of the impossibility defense if, through no fault of that person's own, he or she could not physically or financially make the court-ordered support payment. See Williams, Criminal Law, § 240, p 747 (discussing physical impossibility). We underscore, however, that this must involve some element of unexpectedness and circumstances beyond the defendant's control that make it truly impossible to meet the support obligation. Thus, one who, knowing that he or she is about to undergo major surgery that may have debilitating consequences, nevertheless takes no steps to ensure that a known support obligation is met during a period of convalescence will be situated differently from one who is suddenly injured or unexpectedly incapacitated. See, e.g., *Bamber*, 5 QB at 287 (referring to an "act of God" causing encroachment by the sea). What will be sufficient to establish impossibility in a given case will depend on the individual circumstances of the particular defendant, but passivity, neglect, or failure to plan for parental financial obligations will not excuse neglected parental responsibility.

tion not only reflects "an insufficient concern for paying the debt he owes to society,"[76] it also reflects an insufficient concern for the child. In those instances, the defendant may not invoke the shield of the impossibility defense.

E. PROCEDURAL ASPECTS OF THE IMPOSSIBILITY DEFENSE TO FELONY NONSUPPORT

Having explored the substantive parameters of the impossibility defense, we turn to procedural considerations governing its invocation. To be entitled to a jury instruction on this affirmative defense,[77] a defendant must present prima facie evidence from which the finder of fact could conclude that it was genuinely impossible for the defendant to pay the support, as described in part III(D).[78] If, however, no reasonable trier of fact could conclude from the facts adduced that payment of the support was truly impossible, then the defendant is not entitled to the instruction.[79] Assuming a defendant has made this threshold showing and is entitled to an instruction, then the defendant may be exonerated if the trier of fact finds that the defendant

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[76] *Bearden*, 461 US at 668.

[77] An affirmative defense admits the crime but seeks to *excuse* or *justify* its commission. It does not negate specific elements of the crime. *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997); see also *People v Pegenau*, 447 Mich 278, 319; 523 NW2d 325 (1994) (BOYLE, J., concurring) ("[A]n affirmative defense in effect concedes the facial criminality of the conduct and presents a claim of justification or excuse . . . .").

[78] See *Martin v Ohio*, 480 US 228, 230; 107 S Ct 1098; 94 L Ed 2d 267 (1987) (upholding Ohio statute placing the burden of producing evidence supporting an affirmative defense on the defendant), *Dupree*, 486 Mich at 709-710, and *Lemons*, 454 Mich at 248.

[79] *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995) ("A trial court is required to give a requested instruction [for a defense theory], except where the theory is not supported by evidence.").

has established[80] by a preponderance of the evidence[81] that it was genuinely impossible for him or her to comply with the family court order for each and every violation within the relevant charging period.[82]

Clearly, the record of the defendant's conduct and responses in the family court proceedings is relevant to determining the possibility of compliance with the support order and is relevant to evaluating the defendant's good-faith efforts. Consequently, and in addition to any other relevant evidence, both the defense and the prosecution may rely on the evidentiary record from the family court proceedings. For example, evidence that the defendant was not truthful in the family court proceeding or that the defendant hid assets, failed to provide accurate documentation of the resources and assets at his or her disposal, was voluntarily unemployed or underemployed, failed to exhaust all reasonable and lawful means of generating the income necessary to satisfy the support obligation, or failed to seek timely modification of the family court order

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[80] At common law, the burden of proving an affirmative defense rested on the defendant. *Patterson v New York*, 432 US 197, 202; 97 S Ct 2319; 53 L Ed 2d 281 (1977); *Commonwealth v York*, 50 Mass 93 (1845). See 4 Blackstone, p *202:

> And all these circumstances of justification, excuse or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt.

[81] The United States Supreme Court has upheld the constitutionality of requiring a defendant to prove an affirmative defense as long as the defendant does not have the burden of disproving any of the elements included by the state in its definition of the crime. See *Patterson*, 432 US at 210; *Martin*, 480 US at 232. Although the prosecution must prove the elements of the crime beyond a reasonable doubt, the defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. *Patterson*, 432 US at 206; *Martin*, 480 US at 232.

[82] *People v Monaco*, 474 Mich 48, 56-57; 710 NW2d 46 (2006).

when it became evident that it could not be performed may, singly or in combination, defeat any claim that it was impossible for the defendant to comply with the court order.

Given our description of how evidence from the family court proceedings may be used, we obviously disagree with the Attorney General's contention that the family court's determination of what amount a defendant is capable of paying precludes a defendant from asserting impossibility as a defense to felony nonsupport in the criminal proceeding. Although the criminal nonsupport charge flows from a defendant's noncompliance with the family court's support order, the criminal proceeding on a charge of felony nonsupport is separate and distinct from the family court proceeding. Therefore, the outcome of the family court proceeding simply does not preclude a defendant in a criminal proceeding for felony nonsupport from asserting impossibility as a defense.[83] By the same logic, the criminal proceeding does not provide a defendant with the opportunity to attack the legitimacy or accuracy of the family court's support order or the validity of its underlying findings.[84] In the family court proceeding, the amount of support ordered is determined under the "preponderance of the evidence" standard. Neither the support order nor evidence of a defendant's failure to pay introduced in family court proceedings, singly or

[83] See, e.g., *Hicks ex rel Feiock v Feiock*, 485 US 624, 627-629; 108 S Ct 1423; 99 L Ed 2d 721 (1988) (accepting the state court's determination that ability to comply with a court order is an affirmative defense rather than an element of the offense of contempt); *Davis v Barber*, 853 F2d 1418, 1427-1428 (CA 7, 1988) (finding no violation of due process when the state put the burden of proof on the defendant to show financial inability in a criminal nonsupport case).

[84] Michigan law does not permit the retroactive modification of support orders. MCL 552.603(2); *Malone v Malone*, 279 Mich App 280, 288-289; 761 NW2d 102 (2008).

together, establishes proof beyond a reasonable doubt that a defendant is guilty of felony nonsupport. Rather, because a charge of felony nonsupport is addressed only in a criminal proceeding, it invokes the full panoply of constitutional protections that inhere in any criminal prosecution, which are simply inapplicable in civil family court proceedings.

In a criminal proceeding, the defendant has a constitutional right to have the prosecution prove his or her guilt beyond a reasonable doubt and to have a jury determine his or her guilt or innocence, as well as the merits of the impossibility defense, if applicable, in accordance with that standard of proof. These protections are fundamental to a defendant's right to a jury trial. As the Supreme Court stated in *Stevenson v United States*:

> [S]o long as there is some evidence upon the subject [of whether the defendant was guilty of manslaughter rather than murder], the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might [support the defense], *it then became a proper question for the jury to say whether the evidence were true* . . . . The evidence might appear to the court to be simply overwhelming to show [the defendant's guilt], and yet, so long as there was some evidence relevant to the issue of [the defense], *the credibility and force of such evidence must be for the jury*, and cannot be matter of law for the decision of the court.[85]

Indeed, "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"[86] is equally fundamental in a prosecution for the strict-liability offense of felony nonsupport once the defendant has crossed the

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[85] *Stevenson v United States*, 162 US 313, 314-315; 16 S Ct 839; 40 L Ed 980 (1896) (emphasis added).

[86] *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

high evidentiary threshold required to present the affirmative defense of impossibility to the jury.

We emphasize that nothing in our opinion today undermines the validity of the family court proceeding or its role in setting the amount of child support. We simply wish to make clear that different procedural safeguards exist in family court proceedings than in the criminal proceedings that may flow from the family court's orders and that courts must be cognizant of these distinctions.

1. APPLICATION TO *LIKINE*

In this case, Likine raised and preserved the impossibility defense in the circuit court. Accordingly, we review this preserved claim of constitutional error to determine whether the party benefitting from the error has established that it is harmless beyond a reasonable doubt.[87]

The evidence that Likine sought to introduce, which the circuit court did not allow, relates to her mental illness, incapacitation, and disability. This evidence—if submitted to, and believed by, a jury—might establish impossibility. Under the circumstances, and on the current undeveloped state of the record, we cannot conclude that the error was harmless beyond a reasonable doubt. We therefore reverse the judgment of the Court of Appeals in this case and remand *Likine* to the circuit court for a new trial.

2. APPLICATION TO *PARKS*

Parks neither asserted nor sought to assert an impossibility defense at his criminal trial for felony non-

[87] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

support. He asserted for the first time in the Court of Appeals that his inability to pay was a defense to the charge of felony nonsupport, and although he cited caselaw recognizing impossibility as a common-law defense, he failed to clearly assert an impossibility defense at his trial. Accordingly, we review this unpreserved claim of constitutional error for plain error affecting a substantial right.[88] Under the facts in this case, we cannot say that plain error occurred because Parks never claimed that it was impossible to comply with his child support obligation. Therefore, we affirm the judgment of the Court of Appeals in *Parks*.

3. APPLICATION TO *HARRIS*

Harris entered an unconditional guilty plea to the charge of felony nonsupport under MCL 750.165. An unconditional guilty plea that is knowing and intelligent waives claims of error on appeal, even claims of constitutional dimension.[89] He therefore failed to preserve the constitutional issue presented in this case, and he actually admitted the factual basis for his guilt. Accordingly, we conclude that the circuit court did not abuse its discretion by refusing to allow Harris to withdraw his plea, and he is therefore not entitled to relief.[90]

IV. RESPONSE TO THE DISSENT

The dissent endorses an "inability to pay" defense to felony nonsupport and suggests that the impossibility

[88] *Id*. at 764-765.

[89] *People v New*, 427 Mich 482, 491-492; 398 NW2d 358 (1986).

[90] In light of our conclusion that Harris was not entitled to withdraw his plea, our discussion in part III(E) of the weight to be accorded to the evidentiary record in the family court proceeding, and the absence of any persuasive argument in Harris's brief on appeal regarding the arrearage amount, Harris is not entitled to relief on that issue.

defense we have recognized is "problematic" and "newly minted."[91] In our judgment, these assertions are belied by our reliance on caselaw dating to the seventeenth century recognizing this well-established common-law defense.[92] Notably, although the dissent apparently dislikes this defense, it does not contest that impossibility is, in fact, a defense to MCL 750.165.[93] Indeed, it is beyond dispute that impossibility is a centuries-old common-law defense—recognized in Michigan at least since *Jenkinson*—that attacks the *actus reus* element of a crime of omission.[94] It is also

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[91] *Post* at 428-429. The dissent mischaracterizes our impossibility defense, referring to it as an "impossibility-to-pay defense." Of course, the impossibility defense that we recognize today, contrary to the dissent's appellation, is the traditional, common-law impossibility defense, which takes into account and thereby subsumes the inability-to-pay inquiry, which is the sole consideration for the dissent. The impossibility defense is not a singular inquiry relating only to ability or inability to pay, but instead considers several relevant factors surrounding a particular defendant's circumstances.

[92] See part III(C) of this opinion. The dissent also analyzes the distinction between legal and factual impossibility, which is irrelevant and unhelpful here because this distinction pertains only to attempt crimes.

[93] Thus, it is unclear whether the dissent's inability-to-pay defense is its version of the impossibility defense or whether it is an additional defense to the crime of felony nonsupport. The dissent's description of the inability-to-pay defense, *post* at 436 ("a defendant would have to show that he or she has made all reasonable and good-faith efforts to comply with the support order, but could not"), is actually similar to our description of the impossibility defense, *supra* at 401 ("a defendant must show that he or she acted in good faith and made *all reasonable efforts* to comply with the family court order, but could not do so through no fault of his or her own").

[94] The dissent misconstrues *Jenkinson* as endorsing an inability-to-pay defense. The dissent, however, does not deny that *Jenkinson* recognized the defense of impossibility and implicitly recognizes that, under *Jenkinson*, inability to pay is *part of the analysis* for this defense. Because our impossibility standard, like that in *Jenkinson*, incorporates inability to pay as a consideration of the impossibility defense, it is illogical to conclude, as the dissent does, that our impossibility defense is unconstitutional under *Jenkinson*.

beyond dispute that MCL 750.165 is a crime of omission and that the Legislature has not abrogated this defense.[95]

Additionally, the dissent agrees that MCL 750.165 is a strict-liability offense. Yet the dissent would return the law of Michigan to the precise state that existed *before* the Legislature amended MCL 750.165 and made felony nonsupport a strict-liability offense, contrary to the Legislature's clear intent.[96] To further support its position, the dissent relies on out-of-state authorities, which it asserts demonstrate that Michigan is the only state that does not recognize inability to pay as a defense to a charge of felony nonsupport. In support of this assertion, the dissent provides a 3½-page-long

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[95] The dissent's observation that neither version of the nonsupport statute provides a defense to the charge merely states the obvious and does not change our recognition of the common-law defense of impossibility in light of the lack of any indication in the statutory language that the Legislature intended to abrogate this defense.

[96] The dissent relies on legislative acquiescence, " 'a highly disfavored doctrine of statutory construction,' " *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 177 n 33; 615 NW2d 702 (2000), quoting *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999) to support its conclusion that the "inability-to-pay" defense remains intact after the 1999 amendment to the statute. We could just as easily apply the doctrine of legislative acquiescence to conclude that the Legislature intended to eliminate inability to pay as a defense to the strict-liability crime of felony nonsupport because the Legislature took no action after the Court of Appeals' 2004 decision in *Adams*. The reason the dissent reaches the former conclusion, and not the latter, can only be attributed to the dissent's policy preference. Indeed, that equally plausible conclusions can be reached by applying this doctrine demonstrates the malleable and problematic nature of inferring legislative intent from the Legislature's inaction. It is precisely for this reason that the doctrine is disfavored. "[S]ound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." *Donajkowski*, 460 Mich at 261. Consistently with this principle, our decision recognizes the common-law impossibility defense because, as we discussed in part III(D) of this opinion, there is no indication that the Legislature intended to abrogate this common-law defense.

footnote directly replicated from Likine's brief on appeal.[97] However, the state statutes and caselaw cited in the footnote are inapposite because they involve statutes that are materially different from Michigan's felony-nonsupport statute.[98] More importantly, a closer examination makes plain that the dissent's claim that we are the only state *not* to recognize inability to pay as a defense to nonsupport is simply not so. For example, the footnote cites a 1924 case from Virginia in which the court indeed referred to the defendant's "absolute inability" to contribute, but then concluded that it was clearly established "that his mental and physical condition has made it *impossible* for him to support his wife and children ever since his first conviction . . . ."[99] In our view, this sounds remarkably like the impossibility defense we recognize here.[100] Indeed, contrary to the

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[97] See *post* at 437 n 52; compare Likine's brief on appeal, pp 11-16 n 4.

[98] This point is evidenced by the fact that several of the other states' criminal nonsupport statutes contain elements (such as willfulness) or language (such as "without excuse") that are conspicuously absent from our statute. For further discussion, see note 101 of this opinion.

[99] *Painter v Commonwealth*, 140 Va 459; 124 SE 431, 432 (1924) (emphasis added).

[100] See also DC Code 46-225.02(d), which states:

> For purposes of this section, failure to pay child support, as ordered, shall constitute prima facie evidence of a willful violation. This presumption may be rebutted if the obligor was incarcerated, hospitalized, or had a disability during the period of nonsupport. These circumstances do not constitute an exhaustive list of circumstances that may be used to rebut the presumption of willfulness.

We note that this statute enumerates factors for rebutting the willfulness element contained in that statute that are similar to those we set forth in our decision today. It is also apparent that at least two states referred to in the footnote actually recognize what is more accurately characterized as an impossibility defense like the one we recognize today. See *Painter*, 140 Va 459; see also *Epp v State*, 107 Nev 510, 514; 814 P2d 1011 (1991) (stating, in language strikingly similar to that used in

dissent's overstatement, only 10 states *explicitly* provide that inability to pay is an affirmative defense to nonsupport.[101] Moreover, under Michigan law, the fam-

Jenkinson, "[o]bviously, 'the law does not contemplate punishing a person for failing to do a thing which he cannot do' ") (citation omitted).

[101] See Ariz Rev Stat Ann 25-511B ("It is an affirmative defense to a charge of [failure to provide for one's child] that the defendant . . . was unable to furnish reasonable support."); Colo Rev Stat 14-6-101 ("It shall be an affirmative defense . . . to a prosecution [for felony nonsupport] that owing to physical incapacity or other good cause the defendant is unable to furnish the support . . . ."); Del Code Ann tit 11, § 1113(d) ("In any prosecution for criminal nonsupport or aggravated criminal nonsupport, it is an affirmative defense that the accused was unable to pay or provide support . . . ."); Minn Stat 609.375(8) ("It is an affirmative defense to criminal liability [for nonsupport of spouse or child] if the defendant proves by a preponderance of the evidence that the omission and failure to provide care and support were with lawful excuse."); ND Cent Code 12.1-37-01(4) ("It is an affirmative defense to a charge [of failure to support a child] that the defendant suffered from a disability during the periods an unpaid child support obligation accrued . . . ."); Ohio Rev Code Ann 2919.21(D) ("It is an affirmative defense to a charge of failure to provide adequate support . . . that the accused was unable to provide adequate support . . . ."); Tex Penal Code Ann 25.05(d) ("It is an affirmative defense to prosecution [for criminal nonsupport] that the actor could not provide support for the actor's child."); Utah Code Ann 76-7-201(5)(a) ("[I]t is an affirmative defense [to criminal nonsupport charges] that the accused is unable to provide support."); Wis Stat 948.22(6) ("[A]ffirmative defenses [to failure to support charges] include but are not limited to inability to provide child, grandchild or spousal support."); Wyo Stat Ann 20-3-101(c) ("It is an affirmative defense . . . that the person was unable to provide adequate support . . . ."). In addition, three other states, although not explicitly recognizing ability to pay as an affirmative defense, specifically recognize inability to pay as a defense to nonsupport. See Ind Code 35-46-1-5(d) (providing that "[i]t is a defense [to charges of nonsupport of a dependent child] that the accused person was unable to provide support"); *Rogers v Commonwealth*, 321 SW2d 779, 781 (Ky, 1959) (stating that "[p]hysical disability and financial inability have been recognized as defenses to a prosecution under the child desertion statute"); La Rev Stat Ann 14:74B(1) (providing that "[p]hysical incapacity which prevents a person from seeking any type of employment constitutes a defense to the charge of [nonsupport]").

ily court considers parents' ability to pay *when it sets*

Further, the dissent includes within the footnote states that do not specifically recognize an inability-to-pay defense, but instead consider a parent's ability to pay *within the criminal proceeding*. This is not the same as a defense of inability to pay. See Cal Penal Code 270 (specifically considering, in language cited by the dissent, parents' income and also whether the act or omission "is willful and without lawful excuse"); *Elam v State*, 138 Ga App 432, 432; 226 SE2d 290 (1976) (considering "evidence as to [defendant's] financial condition which tended to negate the element of wilfulness"); Mass Gen Laws ch 273, § 1(4) (providing that a parent is guilty of a felony for failing to comply with a child-support order or judgment "wilfully and while having the financial ability or earning capacity to have complied").

Other states explicitly include ability to pay, or willful failure to pay, *as an element of the offense*. Again, this is not the same as an inability-to-pay defense. Representative states mentioned in the footnote that do not explicitly recognize an inability-to-pay defense but include an element of willfulness or knowledge and also consider ability to pay as part of the criminal charge are Ala Code 13A-13-4 (imposing liability for "intentionally fail[ing] to provide support which that person is able to provide"); Alas Stat 11.51.120(a) (imposing liability for a "knowing[] fail[ure], without lawful excuse, to provide support for the child"); *Nelke v State*, 19 Ark App 292, 294; 720 SW2d 719 (1986) (stating that "[i]n order to make out the offense, the State must show a willful or negligent failure to provide, not a mere failure because of inability" and noting other states' holdings that "the inability to pay cannot be brought about intentionally and willfully by the defaulting parent") (citations omitted); Fla Stat 827.06(2) (imposing liability on "[a]ny person who willfully fails to provide support which he or she has the ability to provide"); *Elam*, 138 Ga App at 432 (noting the statutory requirement that the act "be done 'wilfully and voluntarily' " to support the imposition of liability); Hawaii Rev Stat 709-903(a) (imposing liability when a "person knowingly and persistently fails to provide support which the person can provide"); *State v Krumroy*, 22 Kan App 2d 794, 800; 923 P2d 1044 (1996) (considering Kan Stat Ann 21-3605 and noting that "[t]he issue of whether Krumroy failed to support his child without lawful excuse or without just cause is broader than determining whether he had sufficient income to provide support"); Md Code Ann, Fam Law 10-203(a) (stating that "[a] parent may not willfully fail to provide for the support of his or her minor child"); Miss Code Ann 97-5-3 (imposing felony liability for "[a]ny parent who shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child or children"); NH Rev Stat Ann 639:4 (stating that "[a] person is guilty of non-support if such person knowingly

the child support obligation in the first place.[102]

After this flawed legal analysis, the dissent posits what appears to be its primary objection to this opinion: its claim that our impossibility standard "offends traditional notions of fairness and common sense."[103] In our judgment, it is the dissent's view, not ours, that "offends traditional notions of fairness and common

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fails to provide support . . . which such person can provide"); NJ Stat Ann 2C:24-5 (providing for criminal liability for a person who "willfully fails to provide support which he can provide and which he knows he is legally obliged to provide"); NY Penal Law 260.05(1) (providing for criminal liability for nonsupport for a person who "fails or refuses without lawful excuse to provide support for such child when he or she is able to do so"); *State v McMillan*, 10 NC App 734, 735-736; 180 SE2d 35 (1971) (stating that " 'the failure by a defendant to provide adequate support for his child must be wilful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved' ") (citation omitted); Okla Stat tit 21, § 852 (imposing criminal liability for a parent who "willfully omits, without lawful excuse, to furnish . . . child support"). Clearly, consideration of a parent's ability to pay, or legislative prescription of ability to pay as an element of the offense, does not equate to providing an inability-to-pay defense. An element of ability to pay, as part of the criminal charge itself, is not the same as an affirmative defense, whether based on an inability to pay or something else.

[102] The dissent interprets our acknowledgment that a family court considers parents' ability to pay when it sets a support obligation as dispositive evidence that the "obligor is able to pay." *Post* at 446. This inference, and the multiple other inferences that the dissent makes from it, are not supported by a reasonable interpretation of our decision. That a family court considers a parent's ability to pay when setting a support obligation does not mean, as the dissent suggests, that the support order is entered into evidence and rubber-stamped as proof beyond a reasonable doubt that a defendant is guilty of felony nonsupport. Nor does the admission of the support order in the criminal proceedings undercut the presumption of innocence or shift the burden of proof to the defendant. Rather, we have explained in detail that "the full panoply of constitutional protections that inhere in any criminal prosecution" apply to criminal proceedings for nonsupport. *Supra* at 407.

[103] *Post* at 443.

sense." Requiring parents to provide support for their children and organize their financial affairs in such a way as to be able to do so is wholly consistent with all traditional notions of fairness and common sense of which we are aware, in particular the traditional notions that parents are expected to support their children and make their children's well-being the central priority of their lives.[104] Although the dissent criticizes our approach and complains that "only the rarest of persons" will be able to demonstrate impossibility,[105] that is *exactly* the point. We intend that, consistently with MCL 750.165, a parent who fails to pay court-ordered child support must meet an exacting standard to demonstrate a genuine impossibility defense.[106]

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[104] The dissent accuses the majority of relying "heav[il]y" on public policy, *post* at 443 n 58, but it is the dissent that has injected these policy concerns into the discussion by asserting that our opinion is contrary to traditional notions of fairness and common sense. Our principal analysis is not policy-based, but is based on the plain language of the statute and the fact that there is no indication that the Legislature abrogated the common-law defense of impossibility when it enacted the felony-nonsupport statute. Clearly, we have tried to articulate what might have been the *Legislature's* rationale for striking the "refuse or neglect" language from the statute, not project what might constitute our own policy preferences.

[105] *Post* at 443.

[106] If any explanation were needed for the Legislature's decision to exercise its undisputed authority to define felony nonsupport as a strict-liability crime and thereby "regulate[] conduct under the state's police power to promote the social good," *Quinn*, 440 Mich at 187, it could be found in a report of a Michigan-based task force formed to address "the need for better enforcement of the laws requiring parents to support their own children . . . ." Underground Economy Task Force, *The Underground Economy* (June 2010), p 8, available at <http://courts.michigan.gov/scao/resources/publications/reports/UETF-2010.pdf> (accessed June 15, 2012). This task force, chaired by former Justice and now Department of Human Services Director MAURA CORRIGAN, documents "the sad truth that far too many parents now refuse to accept th[eir] inherent responsibility to support their children." *Id*. The numbers substantiating this "sad truth" are staggering. Every year, "[f]ederal, state, territorial, and

While we have gone to great lengths to articulate the standard a defendant must meet to demonstrate a genuine impossibility defense, the dissent protests and then proceeds to describe a vague inability-to-pay defense that is described in terms that echo our impossibility defense.[107] However, the dissent's inability-to-pay

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local governments spend $5.9 billion just to enforce parents' inherent obligation to support their children." *Id*. at 11. In 2010, the United States Department of Health and Human Services' Office of Child Support Enforcement reported that in Michigan more than 610,000 child support cases had arrears due and calculated the total arrearage at $9.1 million. See Child Support Enforcement FY 2010 Preliminary Report, <http://www.acf.hhs.gov/programs/cse/pubs/2011/reports/preliminary_report_fy2010.html> (accessed June 15, 2012), Tables P-18 and P-20. Moreover, this total greatly underestimates the true arrearage because it does not take into account how much additional child support parents would owe if they fully and honestly disclosed their finances. See *Underground Economy* at 12.

The Underground Economy Task Force report details the strain this serious social problem places on children and the public, concluding:

> [W]hile the number of willfully neglected children has continued to increase, our governments' ability to help them has declined. Those inversely correlated trends have created intolerable stresses for both children and governments. *We no longer can afford—either financially or socially—to excuse parents who will not support their children*. [*Id*. at 10 (emphasis added).]

These considerations, which are completely ignored by the dissent, make clear that the Legislature's decision to define felony nonsupport as a strict-liability crime was perfectly reasonable and that there is nothing remotely offensive to "traditional notions of fairness and common sense" in the Legislature's decision or in this Court's exacting impossibility defense.

[107] In light of the similarity between our language and that of the dissent, see summary in note 93 of this opinion, it is unclear how the dissent can reasonably assert that our impossibility standard fails to pass constitutional muster. Clearly, the dissent agrees with our conclusion that MCL 750.165 imposes strict liability. Yet the dissent asserts that "[a]bility-to-pay determinations made in a civil court cannot constitutionally be used as the basis for establishing that a defendant was able to pay in a criminal case." *Post* at 447. However, ability to pay is not an element in Michigan's nonsupport statute. Further, we have, like the

defense lacks both the structure and breadth of view that we provide. Apparently, in the dissent's view, the relevant consideration is whether an individual charged with felony nonsupport has any money in his or her pocket on the day he or she is haled into court.[108] However, the dissent's rule would permit parents who deliberately refuse to pay child support to shirk their responsibilities to their children and manipulate the criminal justice system, with the result that taxpaying citizens will bear the responsibility of supporting these children, rather than the parent, who ought to be primarily responsible.[109] The dissent protests that un-

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dissent, recognized that a criminal action for felony nonsupport does not disturb the underlying support order that forms the basis of the criminal charge.

[108] We emphasize that the criminal action for felony nonsupport is not an opportunity to revisit the terms of the underlying support order, a point with which the dissent agrees. The amount of child support is determined in the civil proceeding, in which a parent's income and financial resources are considered. A parent who is honest and acts in good faith from the outset, meets his or her support obligation, and, in the instance of changed financial circumstances, timely moves for modification of the support order, is unlikely to be charged with, much less found guilty of, felony nonsupport. Thus, the dissent's concern that the effect of our decision will be to create "debtors' prisons" affecting those *other than* the "willful, recalcitrant, obdurate, or deceitful," *post* at 441, 445, is simply unfounded. In any event, such a case is not before us today, and we need not speculate regarding facts not presented. We have strived to provide guidance for avoiding criminal punishment to parents whose financial circumstances change after their ability to pay has been determined and a support order entered. Thus, the point that seems to have escaped the dissent—that any defense to a charge of felony nonsupport must be assessed on the basis of *some consistent and articulable standard*—was not overlooked by either the legislatures that enacted the statutes the dissent cites or the defense we articulate here today.

[109] The dissent's view would also render meaningless a family court's imputed potential income determination. A child support obligation may be calculated based on imputed income "when a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn." 2008 MCSF 2.01(G). Once the child support obligation is set, and the parent chooses to continue avoiding comparable employment that he or

der our impossibility standard, a person could be found guilty of felony nonsupport "because, although he or she is unable to pay, it might not have been utterly impossible to pay had he or she known how to manage money better."[110] Again, this is exactly the point. We can find nothing unfair about a defense that does not excuse parents from their inherent obligation to support their child simply because they are "unable to pay" child support on a particular day when, over the course of the child's life, they have made irresponsible, selfish financial decisions that reflect a lack of concern for their child's well-being and when, as a result of these decisions, the child is likely to become a public charge.

Unlike the dissent, our view of the question of parental responsibility and obligation leads us to endorse the impossibility defense to a charge of felony nonsupport. Our impossibility defense differs from the dissent's approach because we provide guidance regarding how the defense is to be adjudicated at the circuit court level, and although a parent's ability to pay is one factor that we consider, we also consider other factors. In sum, the ability-to-pay inquiry is subsumed within the impossibility defense. Our interpretation is consistent with centuries-old common law and with the plain language of MCL 750.165, Michigan's nonsupport statute.

V. CONCLUSION

We conclude that *People v Adams* correctly held that MCL 750.165 imposes strict liability because it does not

she is capable of performing (the *very reason* that income was imputed in the first place), the parent can simply claim an "inability to pay" and escape criminal liability. The dissent's ill-advised scheme would have precisely the effect on children and society that the Legislature sought to prevent by enacting a system of court-ordered *parental* support.

[110] *Post* at 443.

require a *mens rea*, and that evidence of a defendant's inability to pay, without more, is not a valid defense to a charge of felony nonsupport. However, we hold that a defendant charged with felony nonsupport may, in exceptional circumstances, on making the requisite evidentiary showing, establish impossibility as a defense to a charge of felony nonsupport.

In summary, having concluded that Likine preserved this claim of constitutional error and that the prosecution has not shown that the error was harmless, we reverse her conviction and remand the case to the circuit court for further proceedings. Because we conclude that Parks is not entitled to relief, we affirm the judgment of the Court of Appeals in that case. Lastly, Harris entered an unconditional guilty plea, which affirmatively waived the defense at issue, and he is therefore not entitled to relief.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

MARILYN KELLY, J. (*dissenting*). The majority advises that its view of parental responsibility and obligations leads it to adopt a new defense to the charge of felony nonsupport, the defense of impossibility to pay. I share the majority's view of the responsibilities and obligations of parents. But there is an important difference between us. It lies in our respective interpretations of what defense MCL 750.165 allows a parent facing imprisonment for failing to pay child or spousal support. For reasons I will describe, I believe that the interests of children, as well as of all other members of society, are best served by providing a more traditional defense. I propose the almost universally accepted defense of inability to pay.

At their essence, these cases are about the basic judicial task of ensuring that government functions within the scope of our state and federal constitutions. Our sister states have been conscientious in undertaking this task. Forty-nine of them and the District of Columbia provide the defense of inability to pay or consider a defendant's ability to pay as an element of the crime of felony nonsupport. Conventional wisdom suggests that the Michigan Supreme Court should adopt the same defense when it considers the question for the first time. It has not done so.

Instead, the majority rejects the national norm and bucks the trend. It concludes that inability to pay does not constitute a defense to felony nonsupport. The defendant must demonstrate impossibility to pay. Moreover, notwithstanding the majority's protestations to the contrary, the inability-to-pay defense is not subsumed within this defense of impossibility to pay. The majority will indeed consider inability to pay. But should any fault whatsoever be shown on the part of the accused, the majority's impossibility-to-pay defense will entirely disregard the strongest evidence of inability to pay. I believe that this standard, at once unique and manifestly harsh, will prove counterproductive. I also believe it is unconstitutional.

Like the majority, I wish to be faithful to the intent of the Legislature in interpreting MCL 750.165. In doing so, I am deeply concerned that we will reinstitute the wisely long-abandoned institution of debtor's prisons. The majority appears to lack this concern.

Furthermore, the majority's "analysis" supporting its impossibility-to-pay defense is flawed from the first page. In crafting it, the majority repeatedly bows to what it declares is the Legislature's expressed intent. But no expressed justification for the majority's posi-

tion is to be found anywhere in any statute. For all of these reasons, I respectfully dissent.

I. ANALYSIS

A. LEGAL BACKGROUND

These cases involve the failure of three defendants to satisfy court-ordered child support obligations. MCL 750.165 criminalizes such conduct.[1] It provides, in relevant part:

> (1) If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both.
>
> (2) This section does not apply unless the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued.
>
> * * *
>
> (4) The court may suspend the sentence of an individual convicted under this section if the individual files with the court a bond in the amount and with the sureties the court requires. At a minimum, the bond must be conditioned on the individual's compliance with the support order. If the court suspends a sentence under this subsection and the individual does not comply with the support order or another condition on the bond, the court may order the

[1] I find it noteworthy that those responsible for publishing Michigan's statutes found it appropriate to caption this provision in terms of penalizing a *refusal* to pay. See 2 Public & Local Acts of Michigan (2004 Session), 2004 PA 570, p 2259 ("Refusing to support wife or children"); see also MCLA 750.165 ("Refusal to pay support for former or current spouse") and MCLS 750.165 ("Refusing to support wife or children").

> individual to appear and show cause why the court should not impose the sentence and enforce the bond. After the hearing, the court may enforce the bond or impose the sentence, or both, or may permit the filing of a new bond and again suspend the sentence.

Although I agree with the majority that MCL 750.165 sets forth a strict liability offense, persons accused of felony nonsupport still have the constitutionally guaranteed right, both state and federal, to present a defense.[2] As the United States Supreme Court has recognized, this guarantee rests on a bedrock constitutional principle: "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."[3] However, the majority severely narrows an accused's constitutionally protected "complete defense" to charges of felony nonsupport. It requires a showing of impossibility to pay. It is this conclusion to which I take exception.

Thirty-five years ago in *People v Ditton*,[4] the Court of Appeals considered an earlier version of MCL 750.165.[5]

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[2] See US Const, Ams VI and XIV; Const 1963, art 1, §§ 13, 17, and 20.

[3] *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984).

[4] *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977).

[5] When *Ditton* was decided, MCL 750.165 provided:

> Where in any decree of divorce, or decree of separate maintenance granted in this state, or by order entered during the pendency of any such proceedings, if personal service is had upon the husband or upon the father of any minor child or children, under the age of 17 years, or such husband or father shall have entered an appearance in such proceedings either as plaintiff or defendant, the court shall order such husband to pay any amount to the clerk or friend of the court for the support of any wife or former wife who by reason of any physical or mental

The defendant argued that his inability to pay barred his prosecution under the statute. He further argued that the trial court had erred by failing to instruct the jury that it must first find that he was able to pay the support ordered. Only then could it find that he had neglected to pay it. The Court of Appeals agreed. It concluded that MCL 750.165 did not expressly provide for the defense of inability to pay, but "[o]ther Michigan criminal nonsupport statutes [made] it necessary to show defendant's ability to pay" as a precursor to obtaining a conviction.[6]

The Court also noted that in contempt proceedings, a party charged with paying child support must be allowed to explain why the support order had not been obeyed and that only " 'the wilful, the recalcitrant, the obdurate or deceitful' . . . are not excused from their legal obligations."[7] Therefore, the Court concluded, the trial court erred when it ruled that the defendant's ability to pay was irrelevant.[8]

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affliction is unable to support herself, or father to pay any amount to the clerk or friend of the court for the support of such minor child or children, and said husband or father shall refuse or neglect to pay such amount at the time stated in such order and shall leave the state of Michigan, said husband or father shall be guilty of a felony: Provided, however, If at any time before sentence he shall enter into bond to the people of the state of Michigan, in such penal sum and with such surety or sureties as the court may fix, conditioned that he will comply with the terms of such order or decree, then the court may suspend sentence therein: Provided further, That upon failure of such person to comply with said undertaking he may be ordered to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence, or for good cause shown may modify the order and take a new undertaking and further suspend sentence as may be just and proper.

[6] *Ditton*, 78 Mich App at 614-615.

[7] *Id*. at 617, quoting *Reed v Reed*, 53 Mich App 625, 627; 220 NW2d 199 (1974).

[8] *Id*. at 617.

The version of MCL 750.165 now in effect was enacted in 1999[9] and is similar to the earlier version. The current version still criminalizes failure to comply with support obligations and specifically indicates the maximum penalty for violations of the statute. The legislative history indicates that the purpose of the revisions was to enact gender-neutral language and provide courts with authority to suspend a sentence under certain circumstances. The Senate Fiscal Agency's analysis stated that the revisions

> would delete and reenact, with gender-neutral language, a provision of the Penal Code making refusal to pay a support order a felony. Under the bill, it would be a felony, punishable by up to four years' imprisonment, a maximum fine of $2,000, or both, for a person subject to a court order for spousal or child support, to fail to pay the support in the amount or at the time stated in the order. The felony provision would not apply unless the person ordered to pay support appeared in the action in which the support order was issued, or received notice of that action by personal service. (The proposed penalty is the same as that established in the law for a felony for which a penalty is not otherwise specified.)
>
> The court could suspend the sentence of a person convicted under the bill if he or she filed with the court a bond in the amount and with the sureties the court required. At a minimum, the bond would have to be conditioned on the person's compliance with the support order. If the person did not comply with the support order or another condition of the bond, the court could order the person to appear and show cause why the court should not impose the sentence and enforce the bond. After the hearing, the court could enforce the bond and/or impose the sentence, or could permit the filing of a new bond and again suspend the sentence.[10]

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[9] See 1999 PA 152.

[10] Senate Bill Analysis, HB 4826, October 12, 1999, p 1.

When the Legislature enacted the current version of MCL 750.165, *Ditton* had permitted defendants to raise an inability-to-pay defense to felony nonsupport charges for the preceding 22 years. Yet that defense was not addressed by 1999 PA 152.[11] The Legislature is presumed to know the law, including decisions of our courts.[12] Its acquiescence to *Ditton* is consistent with the intent to continue to allow an accused to raise an inability-to-pay defense.[13]

Notwithstanding that fact, in *People v Adams*,[14] the Court of Appeals strayed from *Ditton* and held that the

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[11] The majority claims that I miss the point that "any defense to a charge of felony nonsupport must be assessed on the basis of some . . . articulable standard[, which] was not overlooked by . . . the legislatures that enacted the statutes [I] cite[] . . . ." *Ante* at 418 n 108 (emphasis omitted). It is unclear whether the majority is referring to (1) my citation of every other state's consideration of a defendant's inability to pay in note 52 of this opinion or (2) the current and former versions of Michigan's statute. If the majority is referring to every other state's consideration of inability to pay, then it must acknowledge that those states have decided that inability to pay *is* a consistent and articulable standard. If the majority is referring to the current and former versions of Michigan's nonsupport statutes, then its claim is simply inaccurate. Neither the current nor the former version of MCL 750.165 has ever expressly provided a defense to a charge of felony nonsupport.

[12] *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006).

[13] The majority observes that it holds the doctrine of legislative acquiescence in disfavor. Yet it cannot deny that the Legislature made no effort to alter *Ditton*'s holding for 22 years. Moreover, the doctrine of legislative acquiescence has established roots in both United States Supreme Court and Michigan jurisprudence. See, e.g., *Shepard v United States*, 544 US 13, 23; 125 S Ct 1254; 161 L Ed 2d 205 (2005); *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989); *Wikman v City of Novi*, 413 Mich 617, 638; 322 NW2d 103 (1982); *In re Clayton Estate*, 343 Mich 101, 106-107; 72 NW2d 1 (1955). The majority cannot deprive the minority of the tools with which judges typically and traditionally engage in statutory interpretation. Its preferred interpretive methods do not bind other members of the Court. See *People v Williams*, 491 Mich 164, 194 n 31; 814 NW2d 270 (2012) (MARILYN KELLY, J., dissenting).

[14] *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004).

1999 amendments of MCL 750.165 affirmatively precluded a defendant from raising an inability-to-pay defense. *Adams* opined that the revised statute does not allow that defense because felony nonsupport is a strict liability offense.[15] It further reasoned that the defense would be inconsistent with the provision of MCL 750.165 that authorizes suspension of a sentence if the defendant files a bond conditioned on compliance.[16]

Adams held that defendants are effectively precluded from raising a defense of any kind to felony-nonsupport charges. I believe it was wrongly decided and should be explicitly overruled. It is unclear what the majority holds with respect to *Adams*. When it holds that defendants may present an impossibility-to-pay defense, it suggests that *Adams* was wrongly decided. But it agrees with *Adams*'s holding that, if an individual does not pay court-ordered support, he or she is automatically guilty of a felony under MCL 750.165. *Adams* should be unequivocally overruled.[17]

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[15] *Id*. at 100.

[16] *Id*. at 97, citing MCL 750.165(3), now MCL 750.165(4). See 2004 PA 570. The majority posits that my analysis would return the law to its state before the Legislature enacted 1999 PA 152, "contrary to the Legislature's clear intent." *Ante* at 411. This statement masks the fact that no statutory evidence exists that the Legislature intended to remove the inability-to-pay defense that *Ditton* recognized. Nor is there language in MCL 750.165 or in any other statute that supports the majority's impossibility-to-pay defense. By sleight of pen, the majority parlays its reading of MCL 750.165 and of the Legislature's intent into support for an impossibility-to-pay defense. Thus, contrary to the majority's claim otherwise, there can be no analysis "based on the plain language of the statute," *ante* at 416 n 104, because MCL 750.165 provides no defense to a charge of felony nonsupport.

[17] Rather than limit its discussion to the merits, the majority claims that my analysis of the Legislature's acquiescence to *Ditton* is merely my "policy preference." *Ante* at 411 n 96. It argues that, after the Court of Appeals' opinion in *Adams*, the doctrine of legislative acquiescence could also lead one to conclude that the Legislature intended to eliminate

B. THE MAJORITY'S IMPOSSIBILITY-TO-PAY DEFENSE

I find the impossibility-to-pay defense adopted by the majority problematic for several reasons. First, the term "impossibility" has a distinct meaning in criminal law. Courts have distinguished two categories of impossibility in attempt crimes: factual and legal. Factual impossibility exists when a defendant intended to perpetrate a certain crime but failed to commit it because of factual circumstances that were unknown or beyond his or her control.[18]

Legal impossibility can be broken down into two subcategories: pure legal impossibility and hybrid legal impossibility. Pure legal impossibility exists when an actor engages in conduct that he or she believes is prohibited by law, but it is not.[19] Hybrid legal impossibility exists when a defendant's goal is to commit an illegal act, but it is impossible to do so because of a *factual* mistake regarding the *legal* status of some factor relevant to the intended conduct.[20] " 'This version of impossibility is a "hybrid" because, as the

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inability to pay as a defense. This is incorrect. *Adams* effectively precluded all defenses to nonsupport charges, including the impossibility-to-pay defense now sanctioned by the majority, and it is thus unconstitutional. It cannot be assumed that the Legislature agreed with an unconstitutional decision. The doctrine of legislative acquiescence does not fit with the *Adams* decision.

[18] *People v Thousand*, 465 Mich 149, 158; 631 NW2d 694 (2001) (citation omitted). For example, a factual impossibility occurs when a pickpocket picks an empty pocket. See Black's Law Dictionary (9th ed), p 824. This type of impossibility has never been recognized as a defense to a charge of attempt.

[19] *Thousand*, 465 Mich at 158-159. For example, a pure legal impossibility occurs when "a person goes hunting while erroneously believing that it is not hunting season." Black's Law Dictionary (9th ed), p 824.

[20] *Thousand*, 465 Mich at 159. For example, a hybrid legal impossibility exists when an individual attempts to bribe a juror, but chooses someone to bribe who is not on the jury.

definition implies . . . , [the defendant's] impossibility claim includes both a legal and a factual aspect . . . .' "[21]

The cases involved here are not attempt crimes. Moreover, neither factual nor legal impossibility is involved. I discuss the terms merely to show that their use has a nuanced meaning in criminal law. They could easily be confused with the majority's newly minted "impossibility-to-pay" defense in the context of felony nonsupport charges.[22]

A second problem with the majority's analysis is that it is at best marginally supported by one Michigan case decided 123 years ago—*Port Huron v Jenkinson*.[23] *Jenkinson* dealt with a city ordinance that criminalized a property owner's failure to repair a sidewalk adjacent to his property. The Court opined that "[n]o legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his nonperformance of such a duty a crime . . . ."[24] Thus, the Court recognized that the defendant could successfully defend himself by arguing that it was impossible to comply with the ordinance. However, the Court also stated that

> [i]t will readily be seen that a tenant occupying a house and lot in the city of Port Huron, *and so poor and indigent as to receive support from his charitable neighbors*, if required by

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[21] *Id*., quoting Dressler, Understanding Criminal Law (1st ed), § 27.07[B], p 349.

[22] The majority criticizes my discussion of factual and legal impossibility in which I observe that those defenses apply only to crimes of attempt. In doing so, the majority underscores my point: its newly fashioned impossibility-to-pay defense to a charge of felony nonsupport could be confused with the impossibility defenses that have historically applied in a distinctly different setting.

[23] *Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889).

[24] *Id*. at 419.

> the city authorities to build or repair a sidewalk along the street in front of the premises he occupies, and fails to comply with such request, such omission becomes criminal; and, upon conviction of the offense, he may be fined and imprisoned. It is hardly necessary to say these two sections of the statute are unconstitutional and void, and that the provisions are of no force or effect.[25]

Thus, *Jenkinson* recognized that when a defendant is "so poor and indigent" as to be unable to comply with the ordinance, he or she may not be criminally punished. Accordingly, even though *Jenkinson* used the word "impossible" once, it implicitly considered the defendant's inability to pay.

It is apparent that the majority overstates *Jenkinson*'s use of "impossible." *Jenkinson* intended a much broader use of the word, one akin to inability to pay. If it had been shown that the defendant in *Jenkinson* could have used the "support from his charitable neighbors"[26] to build a sidewalk, he would not have satisfied an impossibility defense. He could not have demonstrated that it was impossible for him to pay. But the *Jenkinson* Court held the ordinance unconstitutional *notwithstanding* the defendant's failure to apply this charitable support toward his sidewalk construction obligation. Therefore, the majority's impossibility-to-pay standard fails the constitutional test established by *Jenkinson*. If the defendant in that case could not have satisfied the majority's impossibility-to-pay defense, then that defense is unconstitutional.[27]

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[25] *Id*. at 420 (emphasis added).

[26] *Id*.

[27] Similarly, the majority's reliance on ancient decisions of English courts in support of its impossibility-to-pay defense is of questionable value. First, those decisions were rendered centuries ago in courts having no authority over this Court. Second, they are easily distinguishable from the case before us because they dealt with impossibility in the truest

Third, the majority ignores our Court of Appeals' decision in *Ditton*. *Ditton* held that inability to pay is a defense that must be considered for MCL 750.165 to pass constitutional muster.[28] The majority fails to explain why *Ditton* would not render its impossibility-to-pay defense unconstitutional.

C. THE INABILITY-TO-PAY DEFENSE

1. MICHIGAN

The proper defense to felony nonsupport charges, as set forth in *Ditton*, consists of proving that a defendant is unable to pay the court-ordered support.[29] Ability-to-

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sense of the word. See *Stockdale v Coulson*, 3 All ER 154 (1974) (failing to attach documents that never existed), and *Regina v Bamber*, 5 QB 279, 287; 114 ER 1254 (1843) (comment by Lord Denman, C.J.) (failing to build a road where there was no land). *Regina v Hogan*, 169 ER 504; 2 Den 277 (1851), is also inapposite. That case considered a mother criminally charged with abandonment after momentarily leaving her child in order to procure food for him. Closer scrutiny of *Hogan*'s holding reveals that the defense it sanctioned is more appropriately characterized as inability to pay than impossibility to pay. The court specifically noted that there was not an extensive inquiry into whether the mother had the *means* of supporting the child—not whether it was impossible for her to have supported him. Indeed, that opinion does not contain the word "impossible." In sum, none of these archaic cases furnishes a precedential basis for the majority's narrow impossibility-to-pay defense.

[28] *Ditton*, 78 Mich App at 617 (finding "no meaningful distinction between [MCL 750.165] and the statute found unconstitutional in Kentucky" for lacking an inability-to-pay defense).

[29] The majority earnestly insists that this defense would "permit parents who deliberately refuse to pay child support to shirk their responsibilities to their children and manipulate the criminal justice system . . . ." *Ante* at 418. This is utterly untrue. As in every other jurisdiction that considers a defendant's inability to pay, trial courts would weigh the evidence, if any, to determine whether the defendant is able to pay. If the trier of fact determined that the defendant was able to pay, the defense would not apply. It would not enable a defendant to shirk his or her support obligation or otherwise manipulate the criminal justice system. I fully agree with the majority that support obligors must be held

pay determinations are commonplace in the legal system. For example, in *People v Jackson*,[30] we considered whether a trial court may require a defendant to pay for a court-appointed attorney pursuant to MCL 769.1k without first determining the defendant's ability to pay. We unanimously held that notwithstanding the lack of statutory language providing for an assessment of a defendant's ability to pay, that determination must be made when payment is required.[31] We further held that "once an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship."[32]

Ability-to-pay assessments are also relevant in the context of criminal restitution payments. In *People v Music*,[33] this Court considered whether, in imposing restitution or costs as a part of sentence or probation, a defendant's ability to pay must be considered. The Court again unanimously held that if a defendant asserts the inability to pay restitution or costs, the court must inquire into the defendant's ability or lack of it.[34]

Not only does caselaw suggest that a defendant's ability to pay must be considered when determining criminality or applying a penalty, but so do several statutes. MCL 750.161 criminalizes desertion or nonsupport of a spouse or children. It provides, in pertinent part:

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responsible for satisfying their obligations. This belief, however, does not undermine the legitimacy of the inability-to-pay defense or justify the majority's overly restrictive standard. In every other state, those with support obligations are not able to refuse to pay, shirk their responsibilities, or manipulate the criminal justice system simply by raising an inability-to-pay defense.

[30] *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009).

[31] *Id*. at 275.

[32] *Id*.

[33] *People v Music*, 428 Mich 356; 408 NW2d 795 (1987).

[34] *Id*. at 363.

> A person who deserts and abandons his or her spouse or deserts and abandons his or her children under 17 years of age, without providing necessary and proper shelter, food, care, and clothing for them, and a person who *being of sufficient ability* fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony . . . .[35]

Thus, a conviction under MCL 750.161 presupposes that the defendant has the ability to pay for proper shelter, food, care, and clothing for family members.

Similarly, MCL 750.168 provides that a person convicted of being "a disorderly person" is subject to varying degrees of punishment. MCL 750.167(1)(a) defines "disorderly person" as "[a] person of *sufficient ability* who refuses or neglects to support his or her family."[36] This provision further reflects the Legislature's recognition that a defendant's ability to pay must be considered before imposing criminal punishment.

Ability-to-pay determinations also serve as the underpinning of spousal support awards, which, when violated, form the bases of criminal nonsupport charges. MCL 552.23(1) provides that in divorce and actions for separate maintenance, the court may also award spousal support "after considering the *ability* of either party to pay . . . ."[37] This principle has been extended to child support awards.[38]

2. THE UNITED STATES SUPREME COURT

The United States Supreme Court has also recognized that statutes that punish persons for nonpayment

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[35] MCL 750.161(1) (emphasis added).

[36] Emphasis added.

[37] Emphasis added.

[38] See, e.g., *Beverly v Beverly*, 112 Mich App 657, 661; 317 NW2d 213 (1981).

of debts without permitting them to present evidence of their inability to pay are repugnant to the Constitution. In *Zablocki v Redhail*,[39] the Court struck down as unconstitutional a Wisconsin statute that prohibited men with outstanding child support obligations from marrying without first obtaining a court order granting permission. The plaintiff in that case could not obtain the requisite court order because he lacked the financial resources to meet his support obligations. The Court struck down the statute on both due process and equal protection grounds. Justice Stewart, concurring, noted that the "law makes no allowance for the truly indigent" and that "[t]o deny these people permission to marry penalizes them for failing to do that which they cannot do. Insofar as it applies to indigents, the state law is an irrational means of achieving these objectives of the State."[40]

Concurring in the Court's judgment, Justice Powell distinguished between "persons who are able to make the required support payments but simply wish to shirk their moral and legal obligation" and those "without the means to comply with child-support obligations."[41] He opined that "[t]he vice inheres, not in the collection concept, but in the failure to make provision for those without the means to comply with child-support obligations."[42] Thus, he agreed with his colleagues that the Wisconsin statute was unconstitutional because it failed to provide for those unable, rather than merely unwilling, to pay the child support owed.[43]

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[39] *Zablocki v Redhail*, 434 US 374; 98 S Ct 673; 54 L Ed 2d 618 (1978).

[40] *Id*. at 394 (Stewart, J., concurring).

[41] *Id*. at 400 (Powell, J., concurring).

[42] *Id*.

[43] *Id*. at 400-401, 403.

Likewise, in *Bearden v Georgia*,[44] the United States Supreme Court considered whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution. The Court held that "the trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist."[45] The Court opined that to revoke probation when the petitioner, through no fault of his own, could not pay the fine violated due process because it was "contrary to the fundamental fairness required by the Fourteenth Amendment."[46] The Court approvingly cited Justice Powell's *Zablocki* concurrence, which emphasized the distinction between "persons who shirk their moral and legal obligation to pay . . . from those wholly *unable* to pay."[47]

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[44] *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983).

[45] *Id*. at 661-662.

[46] *Id*. at 672-673.

[47] *Id*. at 669, citing *Zablocki*, 434 US at 400 (Powell, J., concurring) (emphasis added). The majority cites *Bearden* in support of its impossibility-to-pay defense. But nowhere in *Bearden* does the word "impossible" appear, nor any derivation of it. Indeed, the majority opinion is internally inconsistent, as it relies on *Bearden*'s "sufficient bona fide efforts" standard for guidance in one place, but elsewhere suggests that " 'sufficient bona fide efforts . . .' [to repay a support obligation] . . . standing alone will not necessarily establish an impossibility defense . . . ." Compare *ante* at 400 with *ante* at 401. Furthermore, this Court cited *Bearden* in support of its implementation of an ability-to-pay analysis in *Jackson*. See *Jackson*, 483 Mich at 279-280. In any event, when the principles from *Bearden* are applied, an inability-to-pay defense would not "permit parents who deliberately refuse to pay child support to shirk their responsibilities to their children and manipulate the criminal justice system . . . ." *Ante* at 418. This is because an inability-to-pay defense would not provide relief to a parent who "will-

3. APPLICATION OF THE INABILITY-TO-PAY DEFENSE

In light of the aforementioned Michigan caselaw, Michigan statutes, and United States Supreme Court precedent, I would hold that inability to pay is the proper defense to a felony nonsupport charge. To use this defense, a defendant would have to show that he or she has made all reasonable and good-faith efforts to comply with the support order, but could not.[48] In considering a defendant's inability to pay, courts should carefully examine the defendant's financial situation and determine whether the defendant has made sufficient bona fide efforts to comply.[49] However, courts must distinguish between those who willfully shirk their moral and legal obligation to pay and those who are simply unable to do so.[50] As our Court of Appeals explained in *Ditton*:

> "A [parent] who can but will not take care of his [or her] child ought not be coddled by the law. But oppression ought not be practiced in the name of law and justice. . . .
>
> "The accused delinquent parent may have been ever so willing and anxious to perform his [or her] natural duty and to comply with the terms of the civil judgment but was wholly unable to do so."[51]

To be clear, I share the majority's concern that recalcitrant parents must be held accountable. Accord-

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fully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay . . . ." *Bearden*, 461 US at 672.

[48] I agree with the majority that the willful, recalcitrant, obdurate, or deceitful should not escape felony nonsupport charges.

[49] See *Bearden*, 461 US at 662. I believe the United States Supreme Court wisely cast the consideration of a defendant's inability to pay in broad terms in recognition of the fact that the determination will generally require a fact-specific inquiry.

[50] See *Zablocki*, 434 US at 400 (Powell, J., concurring).

[51] *Ditton*, 78 Mich App at 616, quoting *Commonwealth v O'Harrah*, 262 SW2d 385, 388 (Ky, 1953).

ingly, the inability-to-pay defense, like the impossibility-to-pay defense set forth by the majority, would not apply to parents who can but choose not to take care of their children. A willful failure to pay is not an excuse for noncompliance with a support order.

D. THE MAJORITY'S IMPOSSIBILITY-TO-PAY DEFENSE LACKS SUPPORT

With today's groundbreaking opinion, Michigan becomes the only state that does not allow a defendant's inability to pay to constitute a complete defense to a felony nonsupport charge.[52] The majority has created

[52] See Ala Code 13-A-13-4 ("A man or woman commits the crime of nonsupport if he or she intentionally fails to provide support which that person is *able* to provide and which that person knows he or she is legally obligated to provide to a dependent spouse or child less than 19 years of age."); Alas Stat 11.51.120(a) and (f)(3) ("A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child the person knowingly fails, without lawful excuse, to provide support for the child. . . . [W]ithout lawful excuse' means having the financial *ability* to provide support . . . ."); Ariz Rev Stat Ann 25-511B ("It is an affirmative defense to a charge of [failure to provide for a child] that the defendant . . . was *unable* to furnish reasonable support."); *Nelke v State*, 19 Ark App 292, 294; 720 SW2d 719 (1986) ("In order to make out the offense [of failure to support a wife or child], the State must show a willful or negligent failure to provide, not a mere failure because of *inability*."); Cal Penal Code 270 ("The court, in determining the *ability* of the parent to support his or her child, shall consider all income, including social insurance benefits and gifts."); Colo Rev Stat 14-6-101 ("It shall be an affirmative defense . . . to a prosecution [for felony nonsupport] that owing to physical incapacity or other good cause the defendant is *unable* to furnish the support, care, and maintenance required by this section."); Conn Gen Stat 53-304(a) ("Any person who neglects or refuses to furnish . . . support to [a spouse or child] . . . shall be deemed guilty of nonsupport . . . unless . . . the person is *unable* to furnish such support."); Del Code Ann tit 11, § 1113(d) ("In any prosecution for criminal nonsupport or aggravated criminal nonsupport, it is an affirmative defense that the accused was *unable* to pay or provide support . . . ."); DC Code 46-225.02(d) ("[F]ailure to pay child support, as ordered, shall constitute prima facie evidence of a willful violation. This presumption

an exceedingly limited defense to felony nonsupport

may be rebutted if the obligor was incarcerated, hospitalized, or had a disability during the period of nonsupport."); Fla Stat 827.06(2) ("Any person who willfully fails to provide support which he or she has the *ability* to provide to a child or a spouse whom the person knows he or she is legally obligated to support commits a misdemeanor of the first degree . . . ."); *Elam v State*, 138 Ga App 432, 432; 226 SE2d 290 (1976) ("[In convicting the defendant of] wilfully and voluntarily abandoning his minor children . . . the trial court erroneously ruled out some of defendant's evidence as to his financial condition which tended to negate the element of willfulness . . . ."); Hawaii Rev Stat 709-903 ("A person commits the offense of persistent nonsupport if the person knowingly and persistently fails to provide support which the person *can* provide and which the person knows the person is legally obliged to provide to a spouse, child, or other dependent."); *State v Shaw*, 96 Idaho 897, 900; 539 P2d 250 (1975) ("[W]hether the state . . . has overcome by proof beyond a reasonable doubt his *ability* to provide or support and the wilful nature of his non-support or omission, are all factual issues for resolution by the jury."); 750 Ill Comp Stat 16/15(a)(1) ("A person commits the offense of failure to support when he or she . . . willfully, without any lawful excuse, refuses to provide for the support or maintenance of his or her spouse . . . or . . . his or her child or children . . . and the person has the *ability* to provide the support."); Ind Code 35-46-1-5(d) ("It is a defense [to charges of nonsupport of a dependent child] that the accused person was *unable* to provide support."); Iowa Code 726.5 ("A person, who being *able* to do so, fails or refuses to provide support for the person's child or ward under the age of eighteen years for a period longer than one year or in an amount greater than five thousand dollars commits [felony] nonsupport."); *State v Krumroy*, 22 Kan App 2d 794, 800; 923 P2d 1044 (1996) ("[The defendant] would be guilty of failing to provide support without lawful excuse if a jury concluded that he had the *ability* to earn a livelihood and did not do all that he could or should have done under the circumstances."); *Rogers v Commonwealth*, 321 SW2d 779, 781 (Ky, 1959) ("Physical disability and financial *inability* have been recognized as defenses to a prosecution under the child desertion statute."); La Rev Stat Ann 14:74B(1) ("Physical *incapacity* which prevents a person from seeking any type of employment constitutes a defense to the charge of criminal neglect of family."); Me Rev Stat tit 17-A, § 552 ("A person is guilty of nonsupport . . . if he knowingly fails to provide support which he is *able* by means of property or capacity for labor to provide and which he knows he is legally obliged to provide to a spouse, child or other person . . . ."); Md Code Ann, Fam Law 10-203(a) ("A parent may not *willfully* fail to provide for the support of his or her minor child."); Mass Gen Laws ch 273, § 1(4) (A spouse or parent shall be guilty of a felony if

charges not recognized by any legislature or any other

he or she "wilfully and while having the financial *ability* or earning capacity to have complied, he fails to comply with an order or judgment for support which has been entered . . . ."); Minn Stat 609.375(8) ("It is an affirmative defense to criminal liability [for nonsupport of spouse or child] if the defendant proves by a preponderance of the evidence that the omission and failure to provide care and support were with *lawful excuse*."); Miss Code Ann 97-5-3 ("Any parent who shall desert or *wilfully* neglect or refuse to provide for the support and maintenance of his or her child or children . . . shall be guilty of a felony . . . ."); *State v Akers*, 287 SW2d 370, 372 (Mo Ct App, 1956) ("If through no action of his own he lacked the *ability* to support them, [the defendant's] failure to do so was not without good cause and the evidence is insufficient to sustain the conviction."); Mont Code Ann 45-5-621(1) ("A person commits the offense of nonsupport if the person fails to provide support that the person *can* provide and that the person knows the person is legally obliged to provide to a spouse, child, or other dependent."); *State v Bright*, 238 Neb 348, 352; 470 NW2d 181 (1991) ("The determination of whether a defendant has the *ability* to pay child support in order to determine whether the failure to do so was intentional is a question of fact left to the jury."); *Epp v State*, 107 Nev 510, 513-514; 814 P2d 1011 (1991) ("[T]he State could establish willfulness by showing that [the defendant] . . . had the *ability* to generate income . . . . Obviously, the law does not contemplate punishing a person for failing to do a thing which he *cannot* do.") (quotation marks and citation omitted); NH Rev Stat Ann 639:4 ("A person is guilty of non-support if such person knowingly fails to provide support which such person is legally obliged to provide and which such person *can* provide to a spouse, child or other dependent."); NJ Stat Ann 2C:24-5 ("A person commits a crime . . . if he willfully fails to provide support which he *can* provide and which he knows he is legally obliged to provide to a spouse, child or other dependent."); NM Stat 30-6-2 ("Abandonment of dependent consists of a person having the *ability* and means to provide for his spouse or minor child's support and abandoning or failing to provide for the support of such dependent."); NY Penal Law 260.05(2) (A person is guilty of nonsupport of a child when "he or she knowingly fails or refuses without lawful excuse to provide support for such child when he or she is *able* to do so . . . ."); *State v McMillan*, 10 NC App 734, 735-736; 180 SE2d 35 (1971) (" 'In a prosecution [for failure to support a child,] the failure by a defendant to provide adequate support . . . must be wilful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life . . . .' ") (citation omitted); ND Cent Code 12.1-37-01(4) ("It is an affirmative defense to a charge [of failure to support a child] that the defendant suffered from a disability during the periods an unpaid child

support obligation accrued . . . ."); Ohio Rev Code Ann 2919.21(D) ("It is an affirmative defense to a charge of failure to provide adequate support . . . that the accused was *unable* to provide adequate support or the established support but did provide the support that was within the accused's *ability* and means."); Okla Stat tit 21, § 852(A) ("[A]ny parent, guardian, or person having custody or control of a child . . . who willfully omits, *without lawful excuse*, to furnish . . . child support . . . is guilty of a misdemeanor . . . ."); *State v Timmons*, 75 Or App 678, 681; 706 P2d 1018 (1985) ("It is commonly understood that a 'lawful excuse' [for failure to pay support] refers to some condition, not of the defendant's own making, which prevents the defendant from being *able* to provide support."); 23 Pa Cons Stat 4354(a) ("An individual who willfully fails to comply with a support order of a court of this Commonwealth when the individual has the financial *ability* to comply with the support order commits an offense."); RI Gen Laws 11-2-1.1(a) ("Every person who is obligated to pay child support . . . and who shall *willfully* thereafter, having the *means* to do so, fail to pay . . . shall be guilty of a felony . . . ."); SC Code Ann 63-5-20(A) ("Any *able*-bodied person *capable* of earning a livelihood who shall, without just cause or excuse, abandon or fail to provide reasonable support to his or her spouse or to his or her . . . child dependent upon him or her shall be deemed guilty of a misdemeanor . . . ."); SD Codified Laws 25-7-16 ("A parent of a minor child who intentionally omits *without lawful excuse* to furnish . . . [child support] is guilty of a . . . misdemeanor."); Tenn Code Ann 39-15-101(a) ("A person commits the crime of nonsupport who fails to provide support which that person is *able* to provide and knows the person has a duty to provide to a minor child or to a child or spouse . . . ."); Tex Penal Code Ann 25.05(d) ("It is an affirmative defense to prosecution [for criminal nonsupport] that the actor *could not* provide support for the actor's child."); Utah Code Ann 76-7-201(5)(a) ("[I]t is an affirmative defense [to criminal nonsupport charges] that the accused is *unable* to provide support."); *State v Thibedeau*, 95 Vt 164; 113 A 873 (1921) ("Where, as here, the charge is a willful neglect to support, the pecuniary *ability* of the respondent [to pay] is material."); *Painter v Commonwealth*, 140 Va 459; 124 SE 431, 432 (1924) ("That the absolute *inability* of the accused to contribute anything to the support of his family should be held to bar the prosecution, at least temporarily, is apparent from a consideration of the act in its entirety, and its avowed purpose."); Wash Rev Code 26.20.035 ("[A]ny person who is *able* to provide support . . . and who . . . [w]illfully omits to provide necessary food, clothing, shelter, or medical attendance to a child dependent upon him or her . . . is guilty of the crime of family nonsupport."); W Va Code 61-5-29(1) ("A person who . . . [r]epeatedly and willfully fails to pay his or her court-ordered support which he or she *can*

court in the country.[53] Not a *single* state recognizes impossibility as the proper defense to felony nonsupport charges. The majority's decision risks being criticized as a chilling example of judicial activism.

E. THE MAJORITY'S IMPOSSIBILITY-TO-PAY DEFENSE IS UNFAIR

My deep concern about the majority's holding stems not only from the fact that it adopts an unprecedented standard without support, but also from that standard's potential for deleterious effects. More pointedly, I fear a return to an era of debtors' prisons in which indigent individuals are imprisoned simply because they cannot meet their financial obligations.[54] The majority refuses

reasonably provide and which he or she knows he or she has a duty to provide to a minor . . . is guilty of a misdemeanor . . . ."); Wis Stat 948.22(6) ("[A]ffirmative defenses [to failure-to-support charges] include but are not limited to *inability* to provide child, grandchild or spousal support."); Wyo Stat Ann 20-3-101(c) ("It is an affirmative defense to a charge [of desertion] that the person was *unable* to provide adequate support but did provide such support as was within that person's *ability* and means."). (Each emphasis added.)

[53] Contrary to the majority's assertion, it is inconsequential at what stage of a criminal proceeding other states consider a defendant's inability to pay. Some states consider it as an affirmative defense, some as a traditional defense, and some require proof of ability to pay as an element of a nonsupport charge. The fact remains that it is a defendant's inability to pay that must be accounted for—not whether it is impossible to pay. No other state recognizes impossibility to pay or impossibility as an affirmative or traditional defense to, or as an element of, a nonsupport charge.

[54] The United States Supreme Court has explicitly prohibited the practice of debtors' prisons. See, e.g., *Williams v Illinois*, 399 US 235, 241-242; 90 S Ct 2018; 26 L Ed 2d 586 (1970) ("[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."); *Tate v Short*, 401 US 395, 398; 91 S Ct 668; 28 L Ed 2d 130 (1971) ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically

to acknowledge that, unfortunate as it is, many people experience periods in their lives when they are insolvent. This fact does not automatically render them uncaring, deadbeat parents. And it should not necessarily render them criminals. Poverty is not a criminal offense, and our federal and state constitutions guarantee the impoverished the equal protection of the laws.[55] The majority's severe narrowing of the available defense to a nonsupport charge does not adequately safeguard these principles.

In its effort to differentiate its impossibility-to-pay defense from an inability-to-pay defense, the majority paints a picture in which the only two options are at the extreme ends of the spectrum. On one end is the impossibility-to-pay defense, which is, as the majority admits, nearly impossible to meet. On the other is the inability-to-pay defense, which the majority mischaracterizes as cover for a simple refusal to pay. The majority mistakenly casts the inability-to-pay defense as one that gives carte blanche to cold-hearted parents who refuse to support their children, contrary to all moral decency. The reality is quite otherwise. As discussed earlier, in applying this defense, a court typically considers evidence of ability to pay and refusals to pay by those who could pay or could raise the money they owe.

The majority also identifies the most extreme example of a parent who would find it impossible to comply with a support obligation but is completely blameless. It posterizes this hypothetical person as the quintessential example of someone who would satisfy its new impossibility-to-pay defense. In doing so, the

converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.") (quotation marks and citation omitted).

[55] US Const, Am XIV; Const 1963, art 1, § 2.

majority sends a clear signal to our lower courts: our impossibility-to-pay defense exists, but only the rarest of persons will qualify for it.[56] In essence, the majority has created a nearly-impossible-to-satisfy defense. The practical effect of this rule is to press a heavy thumb on the prosecutor's side of the delicate scales of justice.[57]

In an effort to provide comprehensive guidance, the majority creates an impossibility standard that offends traditional notions of fairness and common sense. For example, it does not take into consideration that a defendant must have sufficient minimum resources to feed, clothe, and shelter himself or herself while satisfying a support obligation. The penniless person should not be imprisoned for lacking the capacity to prioritize his or her finances or to arrange his or her financial affairs with future contingencies in mind. Yet the majority's impossibility-to-pay defense would include that person. That person would be imprisoned because, although he or she is unable to pay, it might not have been utterly impossible to pay had he or she known how to manage money better.[58] That person would be imprisoned because, unable to pay, he or she had failed to

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[56] See *ante* at 402 ("[A] defendant must explore and eliminate all the reasonably possible, lawful avenues of obtaining the revenue required to comply with the support order."); *ante* at 402 ("Defendants must not only establish that they cannot pay, but that theirs are among the exceptional cases in which it was not reasonably possible to obtain the resources to pay.") (emphasis omitted); and *ante* at 403 n 75 (requiring "genuine" and "tru[e]" impossibility); see also *ante* at 420 (requiring "exceptional circumstances" to establish impossibility). The majority further injects confusion into its analysis by, at various points, labeling the requisite level of demonstrated impossibility "genuine" or "true."

[57] See *People v Vaughn*, 491 Mich 642, 684; 821 NW2d 288 (2012) (CAVANAGH, J., concurring).

[58] The majority's heavy reliance on public policy to support its impossibility-to-pay defense is surprising given the past reluctance of two members to rely on policy considerations when making precedent. In *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396

"seek timely modification of the family court order when it became evident that it could not be performed . . . ."[59] The majority offers no explanation why inability to pay, coupled with failure to seek modification of the order, should constitute grounds for imprisonment.

Furthermore, the majority seems not to consider the difficulty in producing sufficient evidence to mount a cognizable impossibility-to-pay defense. Proving an inability to pay, let alone satisfying the majority's impossibility-to-pay defense, is a complex and daunting legal matter. As one scholar has astutely observed:

> Proving inability to comply can be factually complex, implicating the economic circumstances of the obligor, his

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(2002), then Justice YOUNG and Justice MARKMAN stated that "[the Court's] function is not to . . . independently assess what would be most fair or just or best public policy."

Assuming that public policy is relevant, the majority's discussion raises unanswered questions. For instance, does the majority consider the high cost borne by taxpayers for imprisoning felons? Does it consider how those costs will increase to the extent we imprison a greater number of those who fail to make support payments? A recent Pew Center report shows that Michigan already has one of the nation's highest incarceration rates and is one of only four states to spend more on prisons than higher education. The Pew Center on the States, *Time served: The high cost, low return of longer prison terms*. June 2012. Available at: <http://www.pwestates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf> (accessed July 3, 2012); see also State of Michigan, *Executive Budget, Fiscal Years 2013 and 2014*, pp A-5, B-15. February 9, 2012. Available at: <http://www.michigan.gov/documents/budget/EB1_376247_7.pdf> (accessed July 3, 2012). Furthermore, it is estimated that Michigan will spend more than $37,000.00 per inmate per year housed in its prisons during 2013 and 2014. *Id*. at B-15. Does the majority weigh the opportunity cost to society when those imprisoned cannot earn wages and make *some* contribution toward a support obligation? Does it consider the dismantling of family bonds that results from imprisoning a delinquent parent who would otherwise still provide emotional support, love, or care to his or her family?

[59] *Ante* at 405-406.

> work history and potential, his available assets, and his own subsistence needs. To meet this burden, the alleged contemnor must at the very least present evidence of his or her employment (or lack thereof), wages, expenses, and assets.
>
> However, gauging the ability to pay may be much more complicated than this, involving issues of good faith responsibility for other obligations, voluntariness of the obligor's unemployment or underemployment, and the availability of borrowed funds or assets owned by others to satisfy the obligor's debt. There may be legal as well as factual components to these issues. The complexity of these issues puts them beyond the understanding of most indigents, who will rarely be able to effectively respond to the petitioner's case in these areas, much less present a case in chief of their own. Even the simplest "inability to pay" argument requires articulating the defense, gathering and presenting documentary and other evidence, and responding to legally significant questions from the bench—tasks which are probably awesome and perhaps insuperable undertakings to the uninitiated layperson. This is particularly true where the layperson is indigent and poorly educated.
>
> Adding to the obligor's burden is the potential that the court will hold his or her testimony concerning inability to pay to be insufficient evidence or lacking in credibility in the absence of documentary corroboration. Retention of the necessary records among indigents is rare, particularly given the widespread instability in their employment, housing, and other aspects of their lives.[60]

Permitting only an impossibility-to-pay defense rather than an inability-to-pay defense heightens the level of evidence needed to refute a nonsupport charge. In a practical sense, it erects a barrier that will prove overwhelming to many who are not willful, recalcitrant, obdurate, or deceitful.

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[60] Patterson, *Civil contempt and the indigent child support obligor: The silent return of debtor's prison*. 18 Cornell J L & Pub Pol 95, 120-121 (2008) (quotation marks and citations omitted).

F. THE MAJORITY'S IMPOSSIBILITY-TO-PAY DEFENSE IS UNCONSTITUTIONAL

Finally, the majority supports its impossibility-to-pay defense by suggesting that because family courts consider ability to pay when setting support obligations, by definition a support obligor is able to pay. There is much to criticize in this logic. It must be remembered that, because family court proceedings are civil in nature, they do not require the same high level of due process as criminal proceedings. They lack certain fundamental constitutional safeguards, including the right to trial by jury, the beyond-a-reasonable-doubt standard of proof, the right to counsel, and the right to effective assistance of counsel.[61] By allowing into evidence a family court's judgment regarding a defendant's ability to pay, the majority would allow evidence that has not been subjected to the constitutional rigors of a criminal trial. Doing so would threaten due process protections by undercutting the presumption of innocence and shifting onto defendants the burden of disproving the *actus reus* of the crime.[62]

In civil proceedings to set child support, trial courts employ a preponderance-of-the-evidence standard to make factual findings regarding a parent's ability to pay.[63] These ability-to-pay determinations include find-

[61] See, e.g., *United States v Mandycz*, 447 F3d 951, 962 (CA 6, 2006) ("Criminal cases offer many due process protections . . . that civil proceedings . . . do not."). The United States Supreme Court has also recognized "the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings . . . ." *Hicks ex rel Feiock v Feiock*, 485 US 624, 632; 108 S Ct 1423; 99 L Ed 2d 721 (1988).

[62] It also creates enormous confusion to institute an impossibility-to-pay defense in a criminal proceeding, when, in the related civil action, the family court used an ability-to-pay standard. See, e.g., MCL 552.23(1).

[63] See, e.g., *Blue Cross Blue Shield of Mich v Governor*, 422 Mich 1, 89; 367 NW2d 1 (1985) ("It is generally well established that issues of fact in

ings of imputed income based on an individual's potential earning capacity.[64] Ability-to-pay determinations are thus inherently linked to the *actus reus* of a subsequent criminal nonsupport charge.

But it is axiomatic that all elements of a criminal charge must be proved beyond a reasonable doubt.[65] The preponderance-of-the-evidence standard used in civil courts affords less protection than the constitutionally guaranteed beyond-a-reasonable-doubt standard of proof used in criminal courts.[66] By importing into a criminal proceeding a civil court's ability-to-pay determination and shifting the burden of proof to the defendant to show impossibility to pay, the majority endangers due process. Ability-to-pay determinations made in a civil court cannot constitutionally be used as the basis for establishing that a defendant was able to pay in a criminal case. Doing so diminishes the prosecution's burden of proof to a standard below the constitutional threshold.[67]

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civil cases are to be determined in accordance with the preponderance of the evidence . . . .") (citations omitted).

[64] See 2008 MCSF 2.01(G).

[65] *Sullivan v Louisiana*, 508 US 275, 277-278; 113 S Ct 2078; 124 L Ed 2d 182 (1993) ("The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements. This beyond-a-reasonable-doubt requirement . . . applies in state as well as federal proceedings.") (citations omitted); *In re Winship*, 397 US 358, 363-364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) ("[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.").

[66] See *Waknin v Chamberlain*, 467 Mich 329, 335-336; 653 NW2d 176 (2002) ("[D]efendant was found guilty beyond a reasonable doubt—a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case . . . .").

[67] This analysis does not disturb the legitimacy of the civil court's underlying support order. That is, a defendant cannot relitigate in a

Furthermore, the majority injects principles of statutory interpretation as support for its impossibility-to-pay defense. It repeats throughout its opinion phrases such as "[c]onsistent[] with the Legislature's expressed intent in the child support statutes"[68] and its unsupported claim that my analysis would "undermine Michigan's legislative system . . . ."[69] It similarly relies on its assertion that its interpretation is "consistent with the plain language of [the] statute . . . ."[70] Frequent repetition of these concepts does not turn the majority's assertions into facts. To be sure, an "interpretation" of a statute's plain language can nonetheless lead to an activist result.[71] As previously stated, there is *no* statutory language in MCL 750.165, express or implied, or in the child support statutes, that gives rise to an impossibility-to-pay defense.[72]

More importantly, the Legislature's intent with respect to the constitutionally mandated defense to a charge of felony nonsupport is extraneous. It is undisputed that some defense must be made available for MCL 750.165 to survive constitutional scrutiny. However, it is not the prerogative of the Legislature to set that constitutional floor. Rather, it is *this Court's* duty

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criminal case the amount of a support order. He or she remains liable for that amount irrespective of the outcome of the criminal proceeding.

[68] *Ante* at 374.

[69] *Ante* at 374.

[70] *Ante* at 375; see also *ante* at 419.

[71] *McCormick v Carrier*, 487 Mich 180, 209; 795 NW2d 517 (2010) ("[T]he . . . majority's 'interpretation' of the plain language of MCL 500.3135(7) was a chilling reminder that activism comes in all guises, including so-called textualism.") (citation and quotation marks omitted).

[72] The majority cannot rely on the child support statutes in support of its analysis. Those statutes govern civil proceedings in which the amount of a support award is set. They are irrelevant to criminal proceedings. MCL 750.165 is the only statute that concerns a criminal nonsupport charge.

to determine what defense, at a minimum, must be made available in order for the statute to be constitutionally applied. By allowing the purported legislative intent to dictate its outcome, the majority abdicates its duty as guardian of our citizens' constitutional protections.

II. CONCLUSION

In sum, the majority's new impossibility-to-pay defense creates a nearly insurmountable barrier to successfully defending felony nonsupport charges. As Michigan has long recognized, it is only "the willful, the recalcitrant, the obdurate or deceitful" who are imprisoned for failing to meet their financial obligations.[73] In light of the majority's holding, we can now add to that list those who are unable to pay and cannot obtain the resources to pay. I believe that the majority's impossibility-to-pay defense will prove grossly unjust in its application and that it is fundamentally unconstitutional. Because a defendant's inability to pay is the proper defense to a felony nonsupport charge, I respectfully dissent.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

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[73] *Reed*, 53 Mich App at 627.

HOFFNER v LANCTOE

Docket No. 142267. Argued December 7, 2011. Decided July 31, 2012. Rehearing denied, 493 Mich 852.

Charlotte Hoffner brought a personal injury action in the Gogebic Circuit Court against Fitness Xpress (an exercise facility), Mousie, Inc. (which operated Fitness Xpress), Pamela Mack and Tiffani Aho (who owned Mousie), and Richard and Lori Lanctoe (who owned the building and property where Mousie leased space for Fitness Xpress) after she slipped and fell on an icy sidewalk in front of the facility. Blue Cross Blue Shield of Michigan, Hoffner's insurer, intervened as a party plaintiff. Under the lease agreement between Mousie and the Lanctoes, the Lanctoes were responsible for snow removal. Defendants moved for summary disposition, arguing that Aho, Mack, and Fitness Xpress should be dismissed from the suit because they did not have possession and control of the sidewalk outside the facility, that all defendants had been released from liability under a release Hoffner had signed as part of her membership with Fitness Xpress, and that defendants owed no duty to Hoffner because the ice was an open and obvious hazard that was avoidable. The court, Joseph D. Zeleznik, J., found there were genuine issues of material fact concerning whether Fitness Xpress, Mack, and Aho could be held responsible as possessors of the premises where Hoffner fell, the scope of the release, and the nature of the icy condition that led to Hoffner's injury. Defendants appealed. The Court of Appeals, MURPHY, C.J., and BECKERING and M. J. KELLY, JJ., affirmed in part, reversed in part, and remanded the case to the circuit court, concluding that Fitness Xpress, Aho, and Mack were entitled to summary disposition because the evidence did not support a conclusion that they had exercised dominion and control over the sidewalk, that the circuit court did not err by finding that questions of material fact existed concerning the effect of the release signed by Hoffner, and that the circuit court correctly denied summary disposition on the issue of premises liability because the icy condition was effectively unavoidable. 290 Mich App 449 (2010). The Lanctoes sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 489 Mich 877 (2011).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Liability may be imposed on a premises possessor when special aspects of a condition make even an open and obvious risk unreasonable. An open and obvious risk might be unreasonable if the danger is effectively unavoidable. In this case, the fact that Hoffner had a contractual right to enter the building had no bearing on the application of Michigan's premises liability law. The icy patch constituted an open and obvious danger and was not effectively unavoidable because Hoffner was not compelled to confront it. Thus, her premises liability claim was barred by the open-and-obvious doctrine.

1. A premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm on the premises, including snow and ice conditions. Liability is imposed for a breach of this duty when the premises possessor knows or should know of the dangerous condition of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. Liability, however, does not arise for open and obvious dangers; landowners are not charged with ensuring absolutely the safety of each person who comes onto their land, even when that person is an invitee. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This standard is an objective standard. Because the issue of the openness and obviousness of a hazard is an integral part of the question of duty, establishing whether a duty exists in light of the open and obvious nature of a hazard is an issue that is usually within the province of the court. Only if an open and obvious hazard is in some manner unreasonable is there a question of fact for the jury. This approach is fully consistent with Michigan precedents and the Second Restatement of the Law of Torts. With regard to ice and snow, a premises possessor has a duty to take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee, but wintry conditions, like any other condition on the premises, may be deemed open and obvious.

2. In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose. The duty owed to an invitee applies to any invitee, regardless of whether a preexisting contractual or other relationship exists. Neither possessing a right to use services nor an invitee's subjective need or desire to use services heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether

to confront an obvious hazard. To conclude otherwise would impermissibly shift the focus from an objective examination of the premises to an examination of the subjective beliefs of the invitee. To the extent that Michigan courts in *Robertson v Blue Water Oil Co*, 268 Mich App 588 (2005), and other cases alluded to a new class of business-invitee protection, the reasoning of those courts was disavowed as inconsistent with the traditional principles of premises liability law. The Court of Appeals erred by concluding that Hoffner's contractual relationship with Fitness Xpress had a bearing on the application of Michigan's premises liability law in this case.

3. As a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when special aspects of a condition make even an open and obvious risk unreasonable. Under this limited exception, liability may arise when the danger is unreasonably dangerous or when the danger is effectively unavoidable. In either circumstance, the danger presents a uniquely high likelihood of harm or severity of harm if the risk is not avoided. The hazard must be unreasonably dangerous, not just dangerous, and it must be more than theoretically or retrospectively dangerous. There was no dispute that the ice on which plaintiff fell was open and obvious. Rather, the dispute centered on whether the ice was effectively unavoidable. Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome. For an open and obvious danger to be effectively unavoidable, a person, for all practical purposes, must be required or compelled to confront the dangerous hazard. A situation in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so. In this case, the danger was not unavoidable, or even effectively so, because Hoffner was not forced to confront the risk, or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk. Nor did Hoffner present evidence that the risk of harm associated with the ice patch was so unreasonably high that its presence was inexcusable. Because the ice was an open and obvious danger and Hoffner did not prove that the ice patch had any special aspects, Hoffner was precluded from recovering in tort as a matter of law.

Judgment of the Court of Appeals reversed in part; case remanded to the circuit court for entry of summary disposition in favor of Richard and Lori Lanctoe.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, agreed with the principles expressed in Justice HATHAWAY'S dissent, but wrote separately to elaborate on his disagreement with the

majority's continued narrowing of the exceptions to the open-and-obvious doctrine. The majority opinion is inconsistent with Michigan precedents and the Restatement. The open-and-obvious doctrine balances the invitor's duty to diminish the hazard of injury with the need for invitees to exercise a reasonable degree of responsibility for their own safety. The Restatement recognizes exceptions to the open-and-obvious doctrine, including that a possessor of land is not relieved of the duty to protect or warn of known or obvious dangers if the possessor should anticipate the harm despite such knowledge or obviousness. While the special aspects of a particular condition may be relevant to a determination whether liability should be imposed, consideration of special aspects should be made in the context of the Restatement test. Under the majority's decision, effectively unavoidable means absolutely unavoidable, leaving viable nothing of the premises possessor's historical duty to clear ice and snow or the exceptions to the open-and-obvious doctrine. The majority's decision is illogical because it no longer requires the invitor to prospectively anticipate whether harm will occur and instead imposes the duty when it will generally be too late to address the hazard. The majority's failure to adequately explain its new standard will result in unnecessary confusion that could be avoided by returning to the Restatement approach. Justice CAVANAGH would have held that the Court of Appeals did not err when it affirmed the trial court's ruling that summary disposition was not appropriate in regard to the Lanctoes.

Justice HATHAWAY, joined by Justice MARILYN KELLY, dissenting, joined Justice CAVANAGH'S criticisms of the majority's conclusion that the Lanctoes owed no duty to Hoffner and wrote separately to express consternation at how far the majority's version of the special-aspects doctrine strayed from Michigan precedent in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244 (1975), and the open-and-obvious doctrine under the Restatement. *Quinlivan* rejected the notion that snow and ice hazards are obvious to all and, therefore, may not give rise to liability and held that premises owners must take reasonable measures, within a reasonable time after an accumulation of snow and ice, to diminish the hazard of injury to invitees. The exceptions to the no-duty rule for open and obvious hazards as set forth in the Restatement cannot be conveniently summarized by a special-aspects analysis and, instead, should have been separately maintained as part of Michigan's caselaw. Under the Restatement, the premises owner retains a duty to protect invitees and could still be held liable when the harm could reasonably be anticipated despite the open and obvious

nature of the danger. The majority's decision also diminished the role of juries in favor of judicial fact-finding in direct contravention of the Michigan Constitution.

1. NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — SPECIAL ASPECTS — EFFECTIVELY UNAVOIDABLE DANGERS.

A premises possessor is generally not liable for open and obvious dangers, but liability may arise when special aspects of a condition make even an open and obvious risk unreasonable; under this limited exception, liability may arise when the danger is unreasonably dangerous or when the danger is effectively unavoidable; for an open and obvious danger to be effectively unavoidable, a person, for all practical purposes, must be required or compelled to confront the dangerous hazard.

2. NEGLIGENCE — PREMISES LIABILITY — DUTY — INVITEES — CONTRACTUAL RIGHT TO USE SERVICES.

Possessing a contractual right to use services or an invitee's subjective need or desire to use services does not heighten a landowner's duties to remove or warn of hazards and does not affect an invitee's choice about whether to confront an obvious hazard.

Cossi Law Offices (by *A. Dennis Cossi*) for Charlotte Hoffner.

Dean & Pope, P.C. (by *Michael K. Pope*), for Richard and Lori Lanctoe.

YOUNG, C.J. Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces. Unfortunately, the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year. This case tests the extent of a premises owner's liability for one of those winter-related accidents. In this case, plaintiff recognized the danger posed by ice on a sidewalk, yet chose to confront the hazard in an ultimately unsuccessful effort to enter the premises. Plaintiff claims that the premises' owners

should be liable for her injuries, while the premises' owners argue that they are not liable because plaintiff's accident occurred as the result of an ordinary, open and obvious condition.

In many regards, this case is unremarkable both in its simplicity and its frequent occurrence in Michigan. Yet there has been some confusion surrounding the application of the open and obvious doctrine to wintry conditions. In Michigan, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises, including snow and ice conditions. However, liability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*. This may include situations in which it is "effectively unavoidable" for an invitee to avoid the hazard posed by such an inherently dangerous condition.

We reject plaintiff's argument that the hazard in this case was effectively unavoidable because plaintiff had a business interest in entering the premises. Neither the caselaw of this state nor the principles underlying the well-established "open and obvious" doctrine support plaintiff's theory of an expanded "business invitee" exception to the open and obvious doctrine, whereby invitees frequenting a business open to the public have an unassailable right to sue in tort for injuries caused by open and obvious conditions. Instead, longstanding principles governing the law of premises liability apply with their traditional force to this case, and exceptions to the open and obvious doctrine are, and are intended to be, limited. The touchstone of the "special aspects" analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an "unreasonably dangerous" hazard must be just that—not just a dan-

gerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an "effectively unavoidable" condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. In this case, the fact that plaintiff, a business invitee, had a contractual *right* to enter the premises does not mean that she was *unavoidably compelled* to confront the icy condition.

We reverse in part the judgment of the Court of Appeals and remand this case to the circuit court for entry of summary disposition in favor of defendants Richard and Lori Lanctoe. The ice on the sidewalk was open and obvious, and plaintiff has not provided evidence of special aspects of the condition that justify imposing liability on the Lanctoes despite the open and obvious nature of the danger.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Charlotte Hoffner had a paid membership to a fitness center, Fitness Xpress, one of several tenants located in a commercial building in Ironwood, Michigan.[1] There is only one entrance to Fitness Xpress, which is serviced by a sidewalk that runs along the length of the building and connects the building to its parking lot. The building, sidewalk, and parking lot are all owned and maintained by defendants Richard and Lori Lanctoe. Under the lease agreements between the building's business tenants and the Lanctoes, the Lanctoes are responsible for snow removal from the parking lot and sidewalk, although some tenants occasionally salt the sidewalk in front of the building.

[1] References in this opinion to "plaintiff" are to Charlotte Hoffner and not to her medical insurer, Blue Cross Blue Shield of Michigan, which intervened as a party plaintiff.

At around 11:00 a.m. on January 28, 2006, plaintiff drove to the building with the intent to exercise. Although the Lanctoes had already cleared and salted the parking lot and sidewalk earlier that day, by the time plaintiff arrived she observed that the sidewalk was icy at the entrance to Fitness Xpress. Plaintiff stated that she could "see the ice and the roof was dripping." Notwithstanding her awareness of the conditions, plaintiff formed the opinion that the ice "didn't look like it would be that bad" and decided to enter the building. As plaintiff explained, "it was only just a few steps," and "I thought that I could make it." Unfortunately, she fell on the ice, injuring her back.

Plaintiff subsequently brought the instant premises liability suit against the Lanctoes, as well as Fitness Xpress and its owners and operator. All defendants moved for summary disposition. Relevant here, defendants argued that plaintiff was barred from pursuing her claim of premises liability because of the open and obvious doctrine, given that the ice was plainly visible, which she recognized before confronting it. The Gogebic Circuit Court denied all of the defendants' motions for summary disposition, reasoning that there was a question of fact regarding whether the icy hazard was "effectively unavoidable" in part because a jury could find that plaintiff had a right to access the building to get value for her membership. The circuit court explained, "So with one entrance, and the fact that [plaintiff] not only had a good reason to go in there, had business to go in there, contractually [plaintiff] had an interest in the activities and equipment that were inside there."

Defendants sought leave to appeal, and the Court of Appeals unanimously affirmed in part and reversed in

part.[2] The Court reversed the trial court's ruling with regard to Fitness Xpress and its owners, holding that they were entitled to summary disposition because they did not have possession and control of the sidewalk where the slip and fall occurred. However, the Court affirmed with regard to the trial court's ruling that the open and obvious doctrine does not bar plaintiff's claims against the premises' owners, the Lanctoes, because the dangerous condition was effectively unavoidable. Similar to the reasoning employed by the circuit court, the Court of Appeals reasoned that

> Hoffner had contracted to use Fitness Xpress and may have needed to use it for health reasons. Because there was only one customer entrance to the facility that was fronted by the icy sidewalk, 'the objective nature of the condition of the premises at issue' reveals that the icy sidewalk was effectively unavoidable as it related to the use of the premises.[3]

In short, the panel believed that because there did not exist an alternative route by which Hoffner, as an invitee with a contractual right to use the facility, could enter the building, the open and obvious doctrine did not serve as a bar to plaintiff's claim.

The Lanctoes filed an application for leave to appeal in this Court, and we directed the clerk to schedule arguments on whether to grant the application for leave to appeal or take other action.[4]

II. STANDARD OF REVIEW

The circuit court denied the Lanctoes' motion for summary disposition pursuant to MCR 2.116(C)(10),

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[2] *Hoffner v Lanctoe*, 290 Mich App 449; 802 NW2d 648 (2010).

[3] *Id.* at 464 (citations omitted).

[4] *Hoffner v Lanctoe*, 489 Mich 877 (2011).

which the Court of Appeals affirmed. A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and when the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. This Court reviews de novo the grant or denial of summary disposition.[5]

III. ANALYSIS

A. PRINCIPLES OF LAW

The law of premises liability in Michigan has its foundation in two general precepts. First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land.[6] Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land.[7] These principles have been used to establish well-recognized rules governing the rights and responsibilities of both landowners and those who enter their land. Underlying all these principles and rules is the requirement that both the possessors of land and those who come onto it exercise common sense and prudent judgment when confronting hazards on the land. These rules balance a possessor's ability to exercise control over the premises with the invitees'

[5] *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

[6] See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

[7] See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001); *Bradley v Burdick Hotel Co*, 306 Mich 600, 604; 11 NW2d 257 (1943); accord *Dascola v YMCA of Lansing*, 490 Mich 899 (2011) (YOUNG, C.J., concurring) ("It is axiomatic in Michigan law that a premises owner is not an absolute insurer against every conceivable harm that may occur on his premises.").

obligation to assume personal responsibility to protect themselves from apparent dangers.

The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land. With regard to invitees,[8] a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land.[9] Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.[10]

Perfection is neither practicable nor required by the law, and "[u]nder ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary [conditions] 'foolproof.' "[11] Thus, an integral component of the duty owed to an invitee considers whether a defect is "open and obvious."[12] The possessor of land "owes no duty to protect or warn" of dangers that are open and obvious

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[8] The duty of care owed by a premises possessor will, of course, depend on whether a plaintiff is an invitee, a licensee, or a trespasser. See generally *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-598; 614 NW2d 88 (2000). In this case, it is undisputed that plaintiff was an invitee—the class to whom the premises owner owes the *greatest* duty of care.

[9] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), citing 2 Restatement Torts, 2d, § 343, pp 215-216.

[10] *Bertrand*, 449 Mich at 609; *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164, 170; 13 NW 499 (1882).

[11] *Bertrand*, 449 Mich at 616-617.

[12] *Lugo*, 464 Mich at 516. When no material issues of fact exist, the existence of a legal duty is a question of law for the court to decide. See, e.g., *Trager v Thor*, 445 Mich 95; 516 NW2d 69 (1994).

because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid.[13] Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection.[14] This is an *objective standard*, calling for an examination of "the objective nature of the condition of the premises at issue."[15]

Yet, as a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable. When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that *unreasonable* risk of harm.[16] We explained in *Lugo v Ameritech Corp, Inc*, how to approach whether special aspects exist in a particular case:

> In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective

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[13] *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); accord *Lugo*, 464 Mich at 516; *Bertrand*, 449 Mich at 610-611.

[14] *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

[15] *Lugo*, 464 Mich at 523-524. The objective standard recognizes that a premises owner is not required to anticipate every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his land. This standard thus provides predictability in the law.

[16] *Lugo*, 464 Mich at 517; *Bertrand*, 449 Mich at 614.

> fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous. . . . [The law] does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented.[17]

It is worth noting *Lugo*'s emphasis on the narrow nature of the "special aspects" exception to the open and obvious doctrine. Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented."[18] The touchstone of the duty imposed on a premises owner being reasonableness, this narrow "special aspects" exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature.

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[17] *Lugo*, 464 Mich at 518 n 2.

[18] *Id.* at 519 n 2.

This Court has discussed two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*. *In either circumstance*, such dangers are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided"[19] and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards. Further, we have recognized that neither a common condition nor an avoidable condition is uniquely dangerous.[20] Thus, when a plaintiff demonstrates that a special aspect exists or that there is a genuine issue of material fact regarding whether a special aspect exists, tort recovery may be permitted if the defendant breaches his duty of reasonable care. Again, as we explained in *Lugo*:

> "[I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions."[21]

With specific regard to ice and snow cases, this Court has "reject[ed] the prominently cited notion that ice and snow hazards are obvious to all and therefore may

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[19] *Id.* at 519.

[20] *Id.* at 520 ("[T]ypical open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to these special aspects."); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

[21] *Lugo*, 464 Mich at 516-517, quoting *Bertrand*, 449 Mich at 611, citing and discussing 2 Restatement Torts, 2d, §§ 343 and 343A, pp 215-222.

not give rise to liability" under any circumstances.[22] Rather, a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that "reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee."[23] However, it is also well established that wintry conditions, like any other condition on the premises, may be deemed open and obvious.[24] Michigan courts thus ask whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger.[25] When a condition is deemed open and obvious, a premises owner's duties are considerably narrowed. Thus, as with premises liability law generally, if the condition is open and obvious, a plaintiff who is injured by the condition may avoid summary disposition only if there are special aspects to the condition.[26]

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[22] *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975).

[23] *Id.*

[24] See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004); *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002). *Quinlivan* only established a duty of care for premises owners regarding snow and ice conditions. Yet, a landowner's duty regarding these conditions as set forth and discussed in *Quinlivan* must be understood in light of this Court's subsequent decisions in *Bertrand* and *Lugo*. See, e.g., *Mann*, 470 Mich at 333 n 13; *Corey*, 251 Mich App at 8-9. We thus take this opportunity to clarify how well-recognized exceptions to the traditional duty of care imposed on premises owners—namely, the open and obvious doctrine—apply in these circumstances.

[25] See, e.g., *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 201 (2010); *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929 (2005), rev'g 264 Mich App 99; 689 NW2d 737 (2004), for the reasons stated in Judge GRIFFIN's dissenting opinion, 264 Mich App at 115-122; *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61; 718 NW2d 382 (2006).

[26] See, e.g., *Corey*, 251 Mich App at 8-9.

In this case, there is no dispute that the ice on which plaintiff fell was objectively open and obvious. Instead, the parties' real dispute concerns whether that readily apparent ice patch was effectively unavoidable and thus constituted a special aspect. This Court has not specifically defined the scope of what constitutes an effectively unavoidable condition. In *Lugo*, we provided the following brief illustrative discussion of a hazard that could be considered effectively unavoidable:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.[27]

As with any special aspect, it is worth noting from the outset that our discussion in *Lugo* of an effectively unavoidable condition was set in the context of a condition that is inherently dangerous and thus poses a severe risk of harm.

The Court of Appeals has applied this unavoidability exception in several notable decisions. In *Joyce v Rubin*, the plaintiff fell on a snowy sidewalk when attempting to retrieve personal belongings from a private home. The plaintiff argued that the slippery condition was unavoidable because the homeowner had refused to provide a rug for traction and would not allow the plaintiff to enter the house through an alternative means. The Court of Appeals disagreed, holding that the exception for effectively unavoidable hazards did not apply because the plaintiff had a choice other than to confront the condition:

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[27] *Lugo*, 464 Mich at 518.

> Though Joyce says that she had no choice but to traverse the slippery walkway to the front door, she presents no evidence that the condition and surrounding circumstances would "give rise to a uniquely high likelihood of harm" or that it was an unavoidable risk. First, Joyce could have simply removed her personal items another day or advised [the defendant] Debra Rubin that, if Rubin did not allow her to use the garage door, she would have to move another day. Further, unlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out. Joyce specifically testified that, after she slipped twice on the sidewalk, she *walked around the regular pathway* to avoid the slippery condition. Therefore, though this is a close case, Joyce's own testimony established that she could have used an available, alternative route to avoid the snowy sidewalk. While Debra Rubin's alleged refusal to place a rug on the sidewalk or allow access through the garage, if true, may have been inhospitable, no reasonable juror could conclude that the aspects of the condition were so unavoidable that Joyce was effectively forced to encounter the condition.[28]

In *Corey v Davenport College of Business (On Remand)*, the plaintiff fell on icy steps outside a college dormitory. The Court of Appeals affirmed the trial court's dismissal of the action, ruling that the steps were not unavoidable because the plaintiff had a choice whether to confront the condition:

> In applying *Lugo* and *Joyce* to the present case, we conclude that the slippery steps at issue here were not only an open and obvious condition but also there are no "special aspects" of the steps that create a "uniquely high likelihood of harm or severity of harm" if the risk is not avoided or serve to remove that condition from the open and obvious danger doctrine. Plaintiff here testified that although he saw the steps and their condition and knew

[28] *Joyce*, 249 Mich App at 242-243.

> that there was an alternate route into the building that was close by, he nonetheless attempted to use them.[29]

Finally, the Court in *Robertson v Blue Water Oil Co*[30] held that a condition *was* effectively unavoidable—a decision upon which plaintiff and the Court of Appeals below rely heavily. In *Robertson*, the plaintiff, a truck driver, visited the defendant's gas station to buy fuel and windshield washer fluid in order to operate his truck during an extreme winter storm that was occurring at the time and had covered the area with a layer of ice. The plaintiff fell on his way into the station, and the Court of Appeals, in a split decision, held that there was a question of fact with regard to whether the open and obvious hazard was effectively unavoidable, distinguishing *Joyce* and *Corey*:

> The record contains no evidence that there existed any available alternatives. Even if there were, the scope of the inquiry is limited to "the objective nature of the condition of the premises at issue." Therefore, the only inquiry is whether the condition was effectively unavoidable *on the premises*. Here, there was clearly no alternative, ice-free path from the gasoline pumps to the service station, a fact of which defendant had been made aware several hours previously. The ice was effectively unavoidable.
>
> Defendant argues that the ice was avoidable because plaintiff was not "effectively trapped." *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002). However, reliance on *Joyce* is misplaced for a number of reasons. Although we discussed the possibility that the plaintiff in *Joyce* could have gone to the premises on a different day, our holding was based on the plaintiff's own testimony that she was aware and, indeed, had made use, of an available alternative route. In any event, a reasonable trier of fact

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[29] *Corey*, 251 Mich App at 6-7.

[30] *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005).

could rationally find that plaintiff *was* "effectively trapped" because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid.[31]

B. DISCUSSION AND APPLICATION

The "special aspects" exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm. Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome.[32] Our discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*. Ac-

[31] *Id.* at 593-594 (citations omitted). The *Robertson* majority further commented on the fact that the plaintiff was a business invitee:

> Finally, and more significantly, plaintiff was a *paying customer* who was on defendant's premises for defendant's commercial purposes, and thus he was an *invitee* of defendant. As our Supreme Court noted, "invitee status necessarily turns on the existence of an 'invitation.' " Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those customers for hazardous conditions as long as the customers even technically had the option of declining the invitation. [*Id.* at 594 (citations omitted).]

The decision in *Robertson* was subject to a strong dissent, which would have held that the open and obvious doctrine applied because the conditions were not "effectively unavoidable." See *Robertson*, 268 Mich App at 598-599 (KELLY, J., dissenting). For reasons stated herein, we reject the *Robertson* majority's analysis of the "effectively unavoidable" doctrine.

[32] See, e.g., *Random House Webster's College Dictionary* (1997).

cordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.

Plaintiff argues here that the ice that caused her harm was effectively unavoidable and, thus, constituted a special aspect, because she had a contractual right to enter Fitness Xpress as a paid member. The lower courts similarly held that the contractual relationship constituted a business interest, thereby qualifying plaintiff as an invitee, and thus "it would be disingenuous to relieve defendants of their duty of care."[33] Accordingly, because no alternative route existed, reasoned the Court of Appeals, "the icy sidewalk was effectively unavoidable as it related to the use of the premises."[34]

We reject these conclusions permitting recovery for a typical hazard confronted under ordinary circumstances as inconsistent with the law of this state regarding the duty owed to invitees and premises owners' resultant liability for injuries sustained by invitees. The law of premises liability in Michigan provides that the duty owed to an invitee applies to *any business invitee*, regardless of whether a preexisting contractual or other relationship exists, and thus the open and obvious rules similarly apply with equal force to those invitees. This Court has stated that the crucial question when determining invitee status is the commercial nature of the relationship between the premises owner and the other party:

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[33] *Hoffner*, 290 Mich App at 464.

[34] *Id.*

> [T]he imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose.[35]

Perhaps what is most troubling regarding the theory of liability advanced by plaintiff is that it would result, if upheld, in an expansion of liability by imposing a new, *greater* duty than that already owed to invitees. By providing that a simple business interest is sufficient to constitute an *unquestionable necessity* to enter a business, thereby making any intermediate hazard "unavoidable," plaintiff's proposed rule represents an unwarranted expansion of liability. It would, in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship. Such a rule would transform the very limited exception for dangerous, effectively unavoidable conditions into a broad exception covering nearly all conditions existing on premises where business is conducted. Such a rule would completely redefine the duty owed to invitees, allowing the exception to swallow the rule. This proposed rule appears to be an erroneous extrapolation of the basic principle that invitees are owed a greater duty of care than licensees or trespassers. Simply put, Michi-

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[35] *Stitt*, 462 Mich at 604; see also *Sink v Grand Trunk W R Co*, 227 Mich 21; 198 NW 238 (1924).

gan caselaw does not support providing special protection to those invitees who have paid memberships or another existing relationship to the businesses or institutions that they frequent above and beyond that owed to any other type of invitee. Neither possessing a right to use services, nor an invitee's subjective need or desire to use services, heightens a landowner's duties to remove or warn of hazards or affects an invitee's choice whether to confront an obvious hazard.[36] To conclude otherwise would impermissibly shift the focus from an objective examination of the *premises* to an examination of the subjective beliefs of the *invitee*.

The unreasonableness of a hazard remains the touchstone for permitting recovery under the "special aspects" exception to the open and obvious doctrine. For example, in *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd*,[37] the plaintiff's employment in the construction business necessitated that he work around a slippery condition while preparing to paint a partially constructed home. Unfortunately, the plaintiff slipped on ice or frost; he pursued a premises liability claim against the general contractor. This Court unanimously concluded that the open and obvious doctrine barred recovery and that no special aspects existed with regard to a typical slippery condition occasioned by the presence of snow and ice. Relevant here, it cannot be said

[36] At oral argument, plaintiff engaged in an effort to limit this invitee subclass one step further to individuals engaged in activities designed to improve health. Plaintiff has cited no caselaw in support, and for good reason: there is even less support for such an idiosyncratic exception to the open and obvious doctrine than there is a lack of support for a general "business invitee" exception or "contractual right of use" exception to the open and obvious doctrine. We can discern no principled reason to begin subdividing premises liability law on the basis of how worthy a purpose we may subjectively believe an invitee had to frequent a business.

[37] *Perkoviq*, 466 Mich at 11.

that compulsion to confront a hazard by the *requirement of employment* is any less "avoidable" than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as membership in a fitness club. *Perkoviq* illustrates that an overbroad understanding of effective unavoidability cannot undermine the historical parameters of the limited duty owed when the condition is open and obvious.

Thus, to the extent that Michigan courts in *Robertson* or otherwise alluded to a new breed of business invitee protection, we disavow that reasoning as inconsistent with traditional principles of premises liability law. Instead, when confronted with an issue concerning an open and obvious hazard, Michigan courts should hew closely to the principles previously discussed. It bears repeating that exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations.[38] Thus, an "unreasonably dangerous" hazard must be just that—not just a dangerous hazard, but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances.[39] An "effectively unavoidable" hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard

[38] See *Lugo*, 464 Mich at 519 ("[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.").

[39] See *id.* at 518 n 2.

and does not rise to the level of a "special aspect" characterized by its *unreasonable risk of harm*.

Applying those principles here, we conclude that this case calls for little more than a simple application of the open and obvious doctrine to bar plaintiff's claim because plaintiff was injured as a result of an *avoidable open and obvious danger* and has provided no evidence of a special aspect to the condition that would justify the imposition of liability. Plaintiff observed the ice at the entrance to the fitness center,[40] which she desired to *enter*. Plaintiff freely admits that she knew that the ice posed a danger, but that she saw the danger as surmountable and the risk apparently worth assuming in order to take part in a recreational activity. Plaintiff was not forced to confront the risk, as even she admits; she was not "trapped" in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk. In other words, *the danger was not unavoidable*, or even effectively so.[41] Moreover, plaintiff presented no evidence that the risk of harm associated with the ice patch was so unreasonably high that its presence was inexcusable, even in light of its open and obvious nature. Again, landowners are not charged with a duty of ensuring absolutely the safety of each person who comes onto their land, even when that person is an invitee. Because there is no dispute that the ice constituted an open and obvious danger, and because plaintiff has not proved that the ice

[40] While generally the standard applied to determine whether a condition is open and obvious is that of a reasonably prudent person, an *objective standard*, it is noteworthy in this case that plaintiff here *actually* (subjectively) recognized the hazard.

[41] It should not be difficult to see, particularly on the facts of a case such as this, how a conclusion to the contrary would all but swallow the rule regarding open and obvious hazards.

patch had any special aspects, plaintiff is precluded from recovering in tort as a matter of law.

IV. RESPONSE TO THE DISSENTS

The dissents take two separate approaches, but ultimately arrive at the same erroneous conclusion. Justice HATHAWAY's dissent ignores this Court's modern premises liability law entirely, concluding that mere anticipation of a harm is sufficient to impose liability on a premises owner. Justice CAVANAGH's dissent recognizes this Court's applicable jurisprudence regarding open and obvious dangers, but ultimately expresses his disagreement with that jurisprudence. We will address these approaches in turn.

We agree with Justice HATHAWAY's general observation that anticipation of a perceived harm is material to the imposition of a duty of care given that, of course, the law does not impose liability for unanticipated or unforeseeable harms.[42] But contrary to Justice HATHAWAY's position, it is not the *only* consideration relevant to the question whether a duty of care exists.[43] To support her view that *mere anticipation* of an injury creates, per se, a duty of care and a jury-submissible question of fact regarding liability for an open and obvious danger would be to render the open and obvious doctrine a legal nullity because harm can be anticipated

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[42] See generally *Brown v Brown*, 478 Mich 545; 739 NW2d 313 (2007).

[43] See *Lugo*, 464 Mich at 525 ("Simply put, there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition. Indeed, it seems obvious to us that if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous. We cannot imagine an open and obvious condition that is unreasonably dangerous, but lacks special aspects making it so.").

from any number of common conditions. Indeed, when could it *ever* be said that harm could not be reasonably anticipated from an open and obvious condition? Ordinary open and obvious conditions are categorically conditions from which harm may be anticipated—that is the characteristic that gives them their special designation in the law that has historically curtailed liability for injuries resulting from them.[44] *The small patch of ice at issue here is of the same character as those open and obvious hazards—like an ordinary pothole or flight of stairs—that this Court has repeatedly stated do not give rise to liability for a premises owner.*

Justice HATHAWAY's dissent further argues, on the basis of its erroneous belief that this Court's decision in *Quinlivan v Great Atlantic and Pacific Tea Co, Inc* controls the outcome of this case, that this opinion ignores precedent.[45] To the contrary, *Quinlivan* merely rejected a per se rule barring liability for snow and ice conditions, and the decision in this case does not affect that holding. The per se rule rejected by *Quinlivan* is markedly different from that of the open and obvious doctrine, which, while it restricts the duty owed for such hazards, nevertheless *permits* liability in certain limited circumstances. These limited circumstances have been discussed and delineated in decisions of this Court subsequent to *Quinlivan*. While Justice HATHAWAY apparently believes that the analysis in cases involving the open and obvious doctrine begins and ends with *Quinlivan*, this opinion has taken pains to set forth the cases and principles that have marked this Court's

[44] See *Williams*, 429 Mich at 500 ("The duty a possessor of land owes his invitees is not absolute, however. It does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself.").

[45] *Quinlivan*, 395 Mich 244.

interpretation of the open and obvious doctrine and premises liability law before *and* in the nearly 40 years since *Quinlivan*. *Quinlivan* only established a duty of care for premises owners regarding winter conditions; our opinion in this case clarifies how well-recognized exceptions to the traditional duty of care imposed on premises owners apply in these circumstances. Yet in favor of its "anticipation" theory of liability, Justice HATHAWAY's dissent ignores all this law, including this Court's "special aspects" test, which is *the* test that governs whether liability may arise from an open and obvious danger and has uncontroversially been so for quite some time.

Justice HATHAWAY's approach also fails to appreciate that whether a duty exists in a tort action is generally a question of law to be decided by the court,[46] and when a court determines that a duty was not owed, no jury-submissible question exists. Because the issue of the openness and obviousness of a hazard is an "integral part" of the question of *duty*,[47] establishing whether a duty exists in light of the open and obvious nature of a hazard is an issue within the province of the court. As discussed previously, it is only when an open and obvious hazard is in some manner *unreasonable* that there is a question of fact for the jury.[48] And as this opinion explains, unreasonableness is the touchstone of

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[46] *Maiden*, 461 Mich at 131; *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997)

[47] *Lugo*, 464 Mich at 516.

[48] See, e.g., *id.* at 517-518 ("[W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.").

the "special aspects" test, which guides the analysis in this opinion. Again, though, because Justice HATHAWAY's dissent ignores recent caselaw concerning the open and obvious doctrine and the "special aspects" analysis entirely, it erroneously concludes that there is a question of fact for the jury to decide in this case, even though the open and obvious doctrine cuts off liability as a matter of law. To the extent that her dissent abandons the controlling premises liability framework and wishes that a different analysis controlled, we believe that it is Justice HATHAWAY's dissent, and not this opinion, that fails to consider Michigan law as set forth in our precedents.

Justice CAVANAGH's dissent takes issue with this opinion's application of the open and obvious doctrine in Michigan or, more specifically, it takes issue with how this doctrine has developed over time, culminating in this decision. While Justice CAVANAGH is entitled to disagree with the development of this area of the law, we believe that it offers necessary clarity and allows for the efficient resolution of this type of case by setting forth an objective and workable framework.

Contrary to Justice CAVANAGH's charge, we respectfully disagree that this opinion renders Michigan law illogical or unworkable. Justice CAVANAGH's dissent characterizes this decision as effectuating a sea-change because, he alleges, now an invitor's duty only arises at the moment an individual is compelled to confront an unavoidable hazard, and thus the law "no longer requires the invitor to prospectively anticipate whether harm will occur, despite the hazard's open and obvious nature."[49] With all due respect, we believe that Justice CAVANAGH's dissent misapprehends our holding. The "effectively unavoidable" compo-

[49] *Post* at 488.

nent of the special aspects exception does not define a premises owner's duty as a whole. Instead, it is but one component of that doctrine that serves as one exception to the general rule precluding liability for open and obvious dangers.[50] With this opinion, we do not broadly erase invitors' duties or limit those duties to effectively unavoidable conditions, as Justice CAVANAGH's dissent alleges. Instead, consistent with our caselaw, we simply apply the standing rule that liability may only be imposed on invitors for an open and obvious condition when there are special aspects to the condition.[51]

Both dissents also argue that this opinion is inconsistent with the Second Restatement of Torts. We begin with the general observation that this Court has never adopted wholesale the Restatement approach. While this Court has looked to the Restatement for guidance, it is our caselaw, as developed through the years, that

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[50] Our opinion in this case focuses in large part on effective unavoidability only because plaintiff argues that it was the unavoidable nature of the hazard in this case that created a special aspect to the open and obvious condition.

[51] We decline to respond to the myriad hypothetical situations that Justice CAVANAGH posits in which the rules articulated in this opinion may have some application in the future. Instead, we believe that we have clearly articulated the governing principles and applicable rules to guide future courts that will have to apply these principles and rules in what are, in some cases, admittedly difficult factual scenarios. As with any other principle or rule of the common law articulated in the previous 175 years of our state's history, to the extent that the governing principles and applicable rules set forth in this case must be further refined or applied in future cases, we will confront those cases as they arise. In particular, however, because it is relevant to some of Justice CAVANAGH'S hypothetical situations, we reiterate that issues arising in application of the open and obvious doctrine are to be decided using an *objective* standard—as our rejection of plaintiff's position and application of the standard in this case illustrates. See also *Lugo*, 464 Mich at 518, 523-524.

provides the rule of law for this State.[52] Nevertheless, it is for the precise reason that our caselaw, including *Lugo* and *Bertrand v Alan Ford, Inc*,[53] has relied on the principles of the Second Restatement of Torts, which this opinion then incorporates and applies, that ultimately belies the dissents' argument that our opinion is inconsistent with the Second Restatement. Discussing the Second Restatement, this Court has summarized the guiding principles as follows:

> When §§ 343 and 343A are read together, the rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide.[54]

This standard—in particular, the focus on the imposition of liability only for unreasonable dangers—is perfectly consistent with our discussion and application of the special aspects test.[55] We have a difficult time reading the Second Restatement as standing for the

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[52] No approach is perfect, and Justice CAVANAGH himself has noted that the Restatement itself "does not explicitly lay out the standard of care," *Lugo*, 464 Mich at 531 (CAVANAGH, J., concurring), and that the Restatement's approach "can be somewhat difficult to apply." *Id.* at 533.

[53] *Bertrand*, 449 Mich 606.

[54] *Id.* at 611, citing and discussing 2 Restatement Torts, 2d, §§ 343 and 343A, pp 215-222.

[55] The Court's opinion in *Lugo*, responding to Justice CAVANAGH's concurrence in that case raising the same basic challenge, reasoned similarly. See *Lugo*, 464 Mich at 525-526.

extraordinarily broad imposition of liability and legal propositions posited by the dissents.

In final response to the dissents, we believe it is again worth noting the key, undisputed facts of this case on which the dissents would impose potential liability on the premises owners. The facts of this case occurred in Michigan's Upper Peninsula, in the dead of winter. On the morning of the accident, the premises owners had cleared and salted the sidewalk before the opening of business. However, by the time plaintiff arrived at the building later that morning, a small ice patch had re-formed over a portion of the sidewalk. We know from the testimony of plaintiff herself that this ice patch was not unreasonable or unusual in some manner because she believed that she could overcome it and affirmatively attempted to do so. There are no allegations in this case of anything other than what every Michigan citizen is compelled to confront countless times every winter.

While the dissents would like to characterize this opinion as closing the courthouse door on injured persons, we are only preserving the balance our law has struck with regard to liability for known, common, ordinary dangers. Contrary to the dissents' arguments, the rationale for imposing liability here exists neither in the world of the Second Restatement nor in Michigan law. Instead, the dissents posit a regime whereby premises owners would become virtual insurers to those who enter their property. Were it to be adopted, the dissents' position that they would leave the determination regarding the scope of the duty owed for an open and obvious danger as a question for the jury would significantly reduce predictability in the law. The process by which the dissents would resolve by jury trial every claim involving an open and obvious danger

would essentially render it impossible for any landowner to anticipate what harms must be remedied in advance in order to *avoid* liability.[56] The goal of the law is not to create uncertainty whereby only a jury determines, after the fact, the scope of a defendant's duty. Rather, the goal of the law is to establish clear standards that allow citizens to ascertain the extent of their duties, liabilities, and responsibilities *before* an accident occurs. The open and obvious doctrine was created precisely to preclude suits in which the harm was obvious and should have been avoided.

V. CONCLUSION

Our decision here reaffirms this Court's interpretation of fundamental principles of the law of premises liability. These rules balance the competing interests of landowners and those who enter their land, ensuring that while no person should be forced to endure unreasonable risks, the simple fact exists that the law compels individuals to accept personal responsibility for their well-being by avoiding apparent hazards, including those precipitated by Michigan winters. The law does not provide recovery for every harm. The "special aspects" exception permits recovery only in circumstances that present a uniquely high likelihood of harm notwithstanding a hazard's obvious nature.

The ice patch on the sidewalk that plaintiff chose to confront was open and obvious, and plaintiff has not

[56] The dissents would thus require a landowner either to keep his property in perfect condition at all times and for all people to ensure against *any* injury, or subject himself to protracted and expensive litigation as a result of injury arising from any common condition. We hardly believe that the dissents' proposed Morton's Fork represents a practical and workable framework, much less a framework compelled by our law.

provided evidence of special aspects of the condition to justify imposing liability on defendants despite the open and obvious nature of the danger. The judgment of the Court of Appeals is reversed in part, and this case is remanded to the Gogebic Circuit Court for entry of summary disposition in favor of the Lanctoes.

MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

CAVANAGH, J. (*dissenting*). While I agree with the general principles expressed in Justice HATHAWAY's dissent, I write separately to elaborate on my disagreement with the majority. Today's majority opinion builds on the so-called "special aspects" doctrine by holding that "effectively unavoidable" means that the injured person must have been "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Ante* at 473. Because the open-and-obvious doctrine has been interpreted as establishing a no-duty rule,[1] and because the majority erroneously decided in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), that the special-aspects doctrine defines the *sole* exception to the open-and-obvious doctrine, today's majority opinion means that only when those unexplained extenuating circumstances arise and force a person to confront an open and obvious hazard does the premises possessor suddenly acquire a duty to address the dangerous condition. Thus, the majority further narrows the exceptions to the open-and-obvious doctrine to the very rarest of situations, without elaborating on when those

[1] As explained in footnote 2 of this opinion, I question whether all questions related to the open-and-obvious doctrine should be characterized as relating to the *duty* of the premises possessor rather than to the standard of care.

extenuating circumstances may arise. This ill-wrought departure from our precedent immunizes premises possessors from nearly all liability arising out of their breaches of a long-recognized duty. Because the majority's relentless redefining and narrowing of the exceptions to the open-and-obvious doctrine will inevitably work to the harm of those who choose to reside in or visit Michigan, I respectfully dissent.

I. THE MAJORITY OPINION IS INCONSISTENT WITH OUR PRECEDENTS AND THE RESTATEMENT OF TORTS

I agree with Justice HATHAWAY that the majority opinion represents yet another unwarranted departure from our longstanding and well-reasoned precedents, which have historically relied on the Restatement of the Law of Torts. See, e.g., *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 92-94; 485 NW2d 676 (1992); *Ackerberg v Muskegon Osteopathic Hosp*, 366 Mich 596, 599-600; 115 NW2d 290 (1962). Based on our traditional adherence to the Restatement, it is well established in our jurisprudence that an invitor owes a legal duty " 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), citing 2 Restatement Torts, 2d, § 343, pp 215-216. The invitor's duty includes the "duty to exercise reasonable care to diminish the hazards of ice and snow accumulation" by taking "reasonable measures . . . within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732

(1975). The sound rationale underlying this rule is that liability for injuries caused by failures to maintain property in a safe condition should rest on the person in control of the property because he or she is in the best position to prevent the injury. *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942).

The open-and-obvious doctrine, however, balances the invitor's duty to diminish the hazard of injury with the need for invitees to exercise a reasonable degree of personal responsibility for their own safety. Thus, it has been said that an invitor generally " 'owes no duty to protect or warn the invitee' " of dangers that are " 'known to the invitee or are *so obvious* that the invitee might reasonably be expected to discover them . . . .' " *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 339; 683 NW2d 573 (2004) (CAVANAGH, J., concurring in part and dissenting in part), quoting *Riddle*, 440 Mich at 96.[2]

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[2] I will accept, but only for purposes of this dissent, that questions related to the open-and-obvious doctrine relate to the premises possessor's duty. As my previous positions indicate, however, questions about the openness and obviousness of a hazard might be better designated as related to the standard of care. See *Lugo*, 464 Mich at 531-541 (CAVANAGH, J., concurring); *Riddle*, 440 Mich at 118-122 (LEVIN, J., dissenting).

I will not attempt to resolve this issue here because what matters is that Michigan courts currently consider the open-and-obvious doctrine to be solely a question of duty. See *Lugo*, 464 Mich at 516 (TAYLOR, J.). This case, however, shows the danger of classifying all questions related to the open-and-obvious doctrine as questions of duty because doing so removes questions of fact from the jury's consideration and encourages courts to grant summary disposition to defendants when there may be genuine issues of material fact concerning whether a danger is open and obvious and, if so, whether the premises possessor still had a duty to address the hazard because the premises possessor should have anticipated the harm. Indeed, the majority's entire special-aspects test was created to provide a framework for courts deciding defendants' motions for summary disposition. See *id.* at 524-525 ("[W]e believe that this 'special aspects' inquiry serves to concretely focus trial courts on the showing that must be made in evaluating motions for summary disposition in this context.").

In turn, however, the Restatement approach recognizes exceptions to the open-and-obvious doctrine. Particularly relevant to this case is 2 Restatement Torts, 2d, § 343A(1), p 218, which provides that a possessor of land is not relieved of the duty to protect or warn of known or obvious dangers if "the possessor should anticipate the harm despite such knowledge or obviousness." The comments on § 343A(1) state, in pertinent part:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. *This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm*. [*Id*. at § 343A(1) comment *f*, p 220 (emphasis added).]

In *Lugo*, however, the majority created its special-aspects test—relying solely on the special aspects of a condition that may make it unreasonably dangerous—and began the systematic rewriting of Michigan premises-liability law in a way that narrows the exceptions to the open-and-obvious doctrine. *Lugo*, 464 Mich at 518-520.[3] As I noted in *Lugo*, the exceptions to the

[3] The *Lugo* majority erroneously seized on *Bertrand*'s use of the term "special aspects" to describe some aspect of a stairway that made it unreasonably dangerous, despite the hazard being open and obvious. It was never my intention that this simple term would be used in a later case to form the basis for an increasingly narrow test designed to apply to all exceptions to the open-and-obvious doctrine. As I stated in *Lugo*:

> [W]hile "special aspects" may be considered in determining whether liability should be suspended, the existence or absence of special aspects in a particular case will not necessarily be outcome determinative. Instead, pursuant to the Restatement, courts must focus on whether an unreasonable danger is presented, whether

open-and-obvious doctrine cannot "be simply summarized in terms of whether 'special aspects' of a condition make the risk of harm unreasonably dangerous." *Id.* at 527 (CAVANAGH, J., concurring). Rather, while the "special aspects of a particular condition may be relevant to a determination whether liability should be imposed . . . , consideration of special aspects should be made in the context of the Restatement test." *Id.* at 542; see, also, *Mann*, 470 Mich at 336 (CAVANAGH, J., concurring in part and dissenting in part) ("I remain committed to the view that the majority's singular [special aspects] approach is wrong and inconsistent with Michigan's premises liability jurisprudence.").

In discussing whether a special aspect makes a condition unreasonably dangerous, the *Lugo* majority gave the example of a puddle of water covering the floor in front of the only available exit to a building. *Lugo*, 464 Mich at 518.[4] Because a customer wishing to leave the store must cross the water, the majority noted that the condition was "effectively unavoidable." *Id.*[5]

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harm should be anticipated, and whether the duty of care has been breached. [*Lugo*, 464 Mich at 543 (CAVANAGH, J., concurring).]

[4] The majority opinion repeats that "neither a common condition nor an avoidable condition is uniquely dangerous." *Ante* at 463. This seems inconsistent with *Lugo*'s example of a puddle of water blocking the only exit to a building as being effectively unavoidable. Puddles of water in front of exits are common in Michigan as patrons track snow in when entering a building. It seems that if a mere puddle of water can be uniquely dangerous, then an icy patch of sidewalk is doubly so. Yet both are common conditions.

[5] The majority also provided the example of "an unguarded thirty foot deep pit in the middle of a parking lot" as an open and obvious hazard that was unreasonably dangerous because it bore the "special aspect" of imposing "an unreasonably high risk of severe harm." *Lugo*, 464 Mich at 518. The instant case relates only to *Lugo*'s "effectively unavoidable" illustration because, in order to enter the health club, plaintiff had to cross a patch of visible snow and ice on the sidewalk adjacent to the only entrance to the facility.

In the years since *Lugo*, there has been considerable debate about what would make a condition effectively unavoidable, and some jurists have interpreted "effectively unavoidable" as being synonymous with "effectively trapped." See *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002); *Robertson v Blue Water Oil Co*, 268 Mich App 588, 594; 708 NW2d 749 (2005); *Preston v Loving Care Flowers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2011 (Docket No. 301241), p 2. Indeed, in this case the Lanctoes argued that plaintiff was not effectively trapped because she was trying to enter—not exit—the fitness club.

Today, the majority continues to dismantle the Restatement approach by holding that "effectively unavoidable" means that the injured person must have been "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Ante* at 473. In other words, "effectively unavoidable" means *absolutely* unavoidable: the individual must have *no alternative* but to hazard the danger. Thus, there is essentially nothing left of the premises possessor's historical duty to clear ice and snow or the exceptions to the open-and-obvious doctrine because it will be incredibly rare that an injured person will be able to show that they were "absolutely compelled" to encounter an open and obvious danger. I find today's holding to be repugnant to the traditional jurisprudence of this Court and a grave disservice to Michigan's citizens and visitors.

II. THE MAJORITY OPINION CREATES AN ILLOGICAL AND UNWORKABLE STANDARD

While the majority seems to be attempting to settle the confusion about the meaning of "effectively unavoidable," the new definition merely continues the

narrowing of the traditional exceptions to the open-and-obvious doctrine by creating an illogical and unworkable standard. This is so because, from this point forward, a premises possessor's duty to warn of or protect against an open and obvious hazard will arise only at the moment an individual is "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Ante* at 473.[6] In other words, an invitor's duty no longer requires the invitor to prospectively anticipate whether harm will occur, despite the hazard's open and obvious nature. See Restatement, § 343A(1), p 218. Indeed, the duty will not even arise until some extenuating circumstance—like a fire inside a building necessitating evacuation—forces individuals to choose between the harms of traversing versus not traversing the risk.[7] Such a rule is nonsensical because it imposes the duty on premises possessors when it will generally be too late to do anything to address the hazard. Essentially, at the moment the building catches on fire the premises possessor would acquire the duty to run outside and salt the visibly slippery sidewalk he or she chose to ignore earlier that morning.

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[6] As discussed in this opinion, the open-and-obvious doctrine has been interpreted as a no-duty rule. Thus, in the context of visible hazards blocking the only available ingress or egress, the new rule could be stated as follows: The invitor owes no duty to warn of or protect against an open and obvious hazard unless the invitee is compelled by extenuating circumstances with no choice but to traverse a previously unknown risk.

[7] The majority's new rule thus shifts the focus from the nature of the condition to the choice made by the injured person who was absolutely compelled to confront the hazard. This seems inconsistent with *Lugo*'s statement that courts are to remain focused on the nature of the hazard. *Lugo*, 464 Mich at 523-524 ("Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.").

In contrast to the majority's position, the Restatement approach is far more workable and logical. It requires the premises possessor to take steps to address the hazard when the premises possessor should anticipate that individuals will be exposed to harm from the risk, despite its open and obvious nature. A patch of icy sidewalk blocking the only entrance to a fitness club is a perfect example. If the premises possessor expects patrons to enter the business he or she holds open to the public, the premises possessor should expect that they will confront the hazard despite its open and obvious nature.

Indeed, the Restatement provides an example in which a person is injured after falling on a visibly "slippery waxed stairway" that provides the *sole access point* to the person's office and "[h]er only alternative to taking the risk was to forgo her employment." Restatement, § 343A(1), illustration 5, p 221. In that illustration, the premises possessor did not escape liability merely because the hazard was open and obvious. Thus, the Restatement approach requires the premises possessor to take steps to address the hazard *at a time when he or she can prevent the harm*—not after some unforeseen and unforeseeable extenuating circumstances arise. Unlike the majority's new definition of "effectively unavoidable," the Restatement approach is prospective—requiring the premises possessor to reasonably anticipate probable harms—not retrospective and arising after the fact.

Unlike the special-aspects test, the Restatement approach serves well the citizens of Michigan who live in a climate that is, as the majority tutors, "prone to winter." *Ante* at 454. It is precisely *because* Michigan experiences wintry conditions that premises possessors have a duty to take reasonable measures within a

reasonable time to address the hazards of ice and snow. Indeed, such a rule would make no sense in a climate that does not experience winter. The premises possessor—not the person who must go about his or her daily business during the winter—is in the best position to remedy hazardous conditions on the premises. *Nezworski*, 301 Mich at 56.[8]

III. THE MAJORITY FAILS TO ADEQUATELY EXPLAIN ITS NEW STANDARD

Through a smattering of iterations, the majority instructs that the invitee must be "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk," *ante* at 473, "inescapably required to confront under the circumstances," "*unavoidably compelled*," *ante* at 456, "*required* or *compelled* to confront a dangerous hazard," *ante* at 469, and "forced to confront the risk," *ante* at 473, but fails to provide guidance about what types of circumstances would suffice. Specifically, the majority fails to state whether these extenuating circumstances must arise externally to and independent of the invitee or whether the extenuating circumstances of the particular individual suffice. Further, the majority opinion offers no guidance about whether it matters if an invitee is entering or exiting a property.

Presumably, a fire or a rampant gunman in a building would constitute extenuating circumstances sufficient to force the fleeing occupants to hazard a known or obvious risk. In that case, because they are exiting

[8] See, also, Restatement, § 343A(2), comment g, p 221 (noting that "the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe").

the building, they would be trapped by a patch of ice blocking the only exit.[9] As I noted, however, it makes no sense to say that the premises possessor's duty arises when the shots ring out or the building bursts into flames, and I do not see how a premises possessor could ever anticipate such extenuating circumstances. While the majority opinion reiterates that "issues arising in application of the open and obvious doctrine are to be decided using an *objective* standard . . . ," *ante* at 478 n 51, this statement fails to provide guidance on the extenuating circumstances that may be subjectively particular to an individual, yet would objectively compel a reasonable person under the same circumstances to confront an open and obvious hazard. For example, consider the situation of a person suffering a severe medical emergency who is confronted with an icy patch blocking the sole entrance to the hospital emergency room or an individual who must suddenly enter or exit a building to come to the aid of a family member suffering a medical emergency. What about a probationer who must hazard the icy patch blocking the sole entrance to a drug-testing center in order to avoid violating his or her probation? In that case the probationer must weigh the risk of crossing against the risk of violating probation and going to jail. In each of these examples, the extenuating circumstance is specific to the individual—and therefore subjective—yet a reasonable person in that same situation would feel compelled to traverse the known or obvious hazard.

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[9] Although at least one iteration of the majority's new rule would also seem to require that the risk be "previously unknown." *Ante* at 473. Whether the risk was actually known or should have been known because it was open and obvious, the majority opinion makes it clear that effective unavoidability means that the injured person had no choice but to hazard the risk. If one has no choice but to cross the hazard, I cannot see why it matters whether he or she previously knew of the risk or not.

While I could provide endless examples of objective and subjective extenuating circumstances that would force a person to choose between braving or avoiding a hazard, my point is that the majority's new definition of "effectively unavoidable" only confuses the matter more and pushes our law further from the Restatement and our own precedent. It also shifts the focus from the objective nature of the hazardous condition to the subjective choice an invitee must make when deciding to cross or not cross the hazard. Courts and practitioners will struggle with these thorny questions in the wake of today's opinion, none of which would arise if we were to return to the Restatement approach.

Contrary to the majority's assertion, I do not "posit a regime whereby premises owners would become virtual insurers to those who enter their property." *Ante* at 480. This statement would only be true if one assumes that in *every* premises-liability case that reaches a jury, the jury *automatically* decides in favor of the injured invitee. Rather, I have confidence in our jury system and a jury's ability to rationally decide a case under the law.[10]

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[10] Despite its professions of adherence to the law, the only "predictability" the majority seeks to add to the law is the certainty of summary disposition for defendants in open-and-obvious cases. As I have pointed out, a premises possessor has little chance of predicting the possible extenuating circumstances that might arise and force an individual to choose between the risks of crossing a hazard versus the risks of not crossing. However, a premises possessor *can* predict with relative ease that invitees will proceed to encounter even an open and obvious hazard when it is blocking the only available entrance to the invitor's business.

Further, I have not espoused a position that would require a landowner to keep his or her property in perfect condition at all times for all people. See *ante* at 481 n 56. Reasonableness—not perfection—is the standard by which a premises possessor's duty is measured. And while I appreciate the majority's introduction of Archbishop of Canterbury John Morton's infamous medieval fork, a Morton's Fork is a choice between two equally unpleasant alternatives. I do not think that asking a premises possessor to cast about a little Morton's Salt to make the only

Were this case to survive summary disposition, the jury might very well find that the Lanctoes did not breach the standard of care because they took reasonable measures within a reasonable time to address the icy condition on the sidewalk, or that although there was a breach of the duty, that breach was not the proximate cause of the harm to plaintiff.[11] I merely posit an approach that is consistent with the pre-*Lugo* jurisprudence of this Court and would allow a premises possessor's ultimate liability in a case such as this to be decided by a jury of Michigan's citizens.

IV. APPLICATION

Under the Restatement approach and this Court's historical jurisprudence, I would hold that the Court of Appeals did not err when it affirmed the trial court's ruling that summary disposition was not appropriate in regard to defendants Richard and Lori Lanctoe. Fitness Xpress was a health club held open to the general public, and plaintiff was invited to make use of the facility. The Lanctoes had a duty to clear the ice and snow hazard in front of the only entrance to the facility, and plaintiff had the reciprocal right to expect that reasonable care would be taken to make safe the only approach available to invitees wishing to make use of the facility. Despite the open and obvious nature of the hazard and the fact that plaintiff knew of the risk, the

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approach to a business *reasonably* safe qualifies as an equally unpleasant alternative to potential liability for injuries. Rather than being a negative alternative, the premises possessor's duty is a beneficial, protective measure imposed to lessen the possibility of injuring invitees and, hence, to avoid the imposition of liability.

[11] Deposition testimony indicates plaintiff suffered a fractured T12 vertebra that required surgery, persistent nerve damage, and long-term pain.

Lanctoes should have anticipated that all customers entering the facility through the sole approach to the front door would be at risk of injury.

V. CONCLUSION

Today's majority opinion creates an illogical and unworkable rule that will serve only to bar the courthouse doors to Michigan's injured invitees. Rather than clarifying the law, the majority opinion creates a host of unanswered questions that will create confusion as courts and practitioners attempt to find the answers. Further, by reducing the invitor's duty to the very rarest of situations involving extenuating circumstances, the majority opinion also reduces the beneficial incentives for Michigan's business owners to take reasonable measures to protect against ice and snow hazards on their property. I would return this Court's jurisprudence to that of the Restatement. Accordingly, I respectfully dissent.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I join Justice CAVANAGH in his well-articulated criticisms of the majority's conclusion that Richard and Lori Lanctoe owed no duty to plaintiff in this case involving a fall on a natural accumulation of ice and snow.[1] While the majority bemoans the fact that I do not thoroughly discuss the past versions of its "special aspects" doctrine, I agree with and will not repeat Justice CAVANAGH'S cogent and insightful criticisms with regard to this ever-evolving and elusive doctrine. I write separately to express my

[1] References in this opinion to "plaintiff" are to Charlotte Hoffner and not to her medical insurer, Blue Cross Blue Shield of Michigan, which intervened as a party plaintiff.

consternation at how far this latest version of the doctrine strays from binding precedent in this state.

In this latest version, the majority holds that the "special aspects" exception to the open and obvious doctrine only permits recovery in circumstances that present a uniquely high likelihood of harm. The majority further holds that because plaintiff was not "trapped" in a building or "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk," the danger was not unavoidable or even "effectively" so. I disagree because the majority decision not only fails to follow binding precedent, it also disregards the open and obvious doctrine as set forth in 2 Restatement Torts, 2d, §§ 343 and 343A, pp 215-222. Moreover, the decision diminishes the role of juries in favor of judicial fact-finding, in direct contravention of the specific mandate of the Michigan Constitution.

First and foremost, as the majority acknowledges, *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*[2] remains binding precedent in this state.[3] *Quinlivan* rejected the notion that Michigan's northern geographic location somehow relieves a premises owner of duties owed to an invitee. In doing so, this Court looked to the common law of the state of Alaska for guidance. *Quinlivan* quoted Alaska's approach with approval:

> "Alaska's climatic conditions do not metamorphize all risks arising from ice and snow conditions into reasonable risks for the business invitee. Nor are we persuaded by appellee Carr's policy argument that in Alaska it would result in unreasonable costs to the private-commercial possessor of land to require the possessor to clear ice and

[2] *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975).

[3] See *ante* at 463-464.

> snow, or otherwise remedy conditions which amount to unreasonable risks of harm to its business invitees. The mere fact that snow and ice conditions prevail for many months throughout various locations in Alaska is not in and of itself sufficient rationale for the insulation of the possessor of land from liability to his business invitee. Nor do such climatic conditions negate the possibility that the possessor should have anticipated harm to the business invitee despite the latter's personal knowledge of the dangerous snow and ice conditions or the general obviousness of such conditions.
>
> "What acts will constitute reasonable care on the part of the possessor of land will depend on the particular variables of each case. Our decision today does not represent the adoption of a flat requirement that the possessor's duty requires that he attempt to keep his land free of ice and snow. Dependent on the circumstances, reasonable care on the possessor's part could be demonstrated by other reasonable acts such as the sanding of the area, or application of salt."[4]

Moreover, *Quinlivan* acknowledged the rigorous duties owed an invitee. *Quinlivan* held that a premises owner owes a duty to an invitee to protect him or her from the hazards of *natural* accumulations of ice and snow. The Court held:

> In our view the Alaska Court has appropriately conceived the legal duty owed by the invitor to the invitee. As that Court found the basis for its decision rooted in pre-existing Alaska law, we find that the basis for our decision is grounded in cases such as *Torma* [v *Montgomery Ward & Co*, 336 Mich 468; 58 NW2d 149 (1953)], which have recognized the rigorous duty owed an invitee. To the extent pre-existing case law authority indicated that the natural accumulation rule applied in an invitor-invitee context, that authority is overruled. *For reasons adequately stated by the Alaska Court, we reject the prominently cited*

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[4] *Quinlivan*, 395 Mich at 259-260, quoting *Kremer v Carr's Food Center, Inc*, 462 P2d 747, 752 (Alas, 1969).

> *notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation.* The general description of the duty owed appearing in the Restatement is a helpful exposition of the duty described in *Torma.* As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.[5]

Thus, *Quinlivan* soundly rejected the previously held notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the Court acknowledged that a premises owner is not an absolute insurer of the safety of an invitee, the Court recognized that a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. In order to fulfill that duty, a premises owner must take reasonable measures, within a reasonable time after an accumulation of ice and snow, to diminish the hazard of injury to invitees. As *Quinlivan* clearly opined, the question is one of reasonableness. The premises owner has a duty to take reasonable steps to diminish the hazard of ice and snow, and invitees have a duty to take reasonable actions for their own safety. Today's decision fails to apply this analysis. While the majority cites *Quinlivan* as controlling precedent, it applies an analysis that ignores these principles. If the majority intends to overrule *Quinlivan*, it should do so in a forthright manner rather than claim that it is merely "clarifying" the law.

Moreover, to the extent that the open and obvious doctrine plays any role in the discussion of the Lanctoes' duty in this case, §§ 343 and 343A of the Second

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[5] *Quinlivan*, 395 Mich at 260-261 (emphasis added).

Restatement of Torts form the basis for Michigan's open and obvious danger caselaw, and I see no reason to abandon the principles set forth in those sections. The Restatement contains exceptions to the so-called "no-duty" rule that the open and obvious doctrine creates. Rather than address these exceptions, the majority focuses on "special aspects." However, as Justice CAVANAGH has astutely observed, the Restatement contains exceptions to the no-duty rule, and "these exceptions cannot be conveniently summarized by a 'special aspects' analysis."[6] Instead, the exceptions as set forth in the Restatement need to be maintained as part of Michigan's caselaw.

The relevant sections of the Restatement provide:

> § 343. Dangerous Conditions Known to or Discoverable by Possessor
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.
>
> * * *
>
> § 343 A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them,

[6] *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 337; 683 NW2d 573 (2004) (CAVANAGH, J., concurring in part and dissenting in part).

> unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.[7]

While there is no absolute duty to warn invitees of known or obvious dangers, important exceptions emerge from the Restatement that limit the application of this general rule. The primary exception is that a premises owner is not liable unless he or she "*knows or by the exercise of reasonable care*" would discover or realize that invitees "*will fail to protect themselves against*" the danger or "*unless the possessor should anticipate the harm despite such knowledge or obviousness*."[8] Thus, under the Restatement, the premises owner retains a duty to protect invitees and may still be held liable when the harm could be reasonably anticipated despite the fact that the danger is open and obvious. This exception was acknowledged in *Riddle v McLouth Steel Products Corp*:

> Moreover, the "no duty to warn of open and obvious danger" rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case. A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. However, where the dangers are known to the invitee or are so obvious that the invitee

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[7] 2 Restatement Torts, 2d, §§ 343 and 343A, pp 215-216, 218 (emphasis omitted).

[8] *Id.* at pp 215, 218 (emphasis altered).

> might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee *unless he should anticipate the harm despite knowledge of it on behalf of the invitee.*
>
> Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. The jury must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent.
>
> If, for example, the dangerous conditions on the premises are hidden or latent, the premises owner is obliged to warn the invitee of the dangers. Defendant's failure to warn under these circumstances may indicate a breach of the legal duty owed plaintiff. *If the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger.* What constitutes reasonable care under the circumstances must be determined from the facts of the case. While the jury may conclude that the duty to exercise due care requires the premises owner to warn of a dangerous condition, there is no absolute duty to warn invitees of known or obvious dangers.[9]

Additionally, in applying this exception, an important principle emerges from the language of the Restatement. The Restatement clearly provides that a premises owner owes a heightened duty to *anticipate* possible harm to invitees. Section 343A provides that "[i]n determining whether the possessor should anticipate harm from a known or obvious danger, the *fact that the invitee is entitled to make use* of public land . . . *is a factor of importance indicating that the harm should be anticipated.*"[10] Thus, when a person is an invitee en-

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[9] *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95-97; 485 NW2d 676 (1992) (emphasis added) (citations omitted).

[10] 2 Restatement Torts, 2d, § 343A, p 218 (emphasis altered).

titled to use the premises, his or her invitee status is a *factor of importance indicating* that the premises owner should have anticipated the harm. This principle clearly recognizes the increased duty that the premises owner owes to an invitee and that the mere status as an invitee serves as an important factor indicating that the premises owner should have anticipated the harm. This principle requires that the premises owner anticipate harm that might occur to an invitee. It is reasonable to assume that customers will use entrances open to the public during business hours, and a premises owner is thus duty-bound to anticipate harm that might come to the business invitee who uses those entrances. The majority fails to recognize this important concept and, instead, it fashions an ill-conceived and erroneous set of rules for the application of the open and obvious doctrine.

Turning to the application of the law to this case, there is no question that the majority recognizes the dangers presented by ice and snow.[11] There is also no question that plaintiff was a business invitee who was entitled to use the premises by virtue of the membership that she bought from Fitness Xpress. The fitness facility was open for plaintiff to use and enjoy during winter months. Plaintiff fell on ice and snow in front of the only entrance to Fitness Xpress. Under the lease Fitness Xpress had signed with the Lanctoes, who owned the property, the Lanctoes were responsible for snow removal. Given these circumstances, it would not be unreasonable for a jury to find that the Lanctoes should have anticipated that plaintiff would have failed

[11] This recognition is clearly noted in the majority's statement that "[u]nfortunately, the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year." *Ante* at 454.

to protect herself from the hazard presented by the ice and snow because there was no other method of public ingress to and egress from the business. Nor would it be unreasonable for a jury to find that plaintiff did not perceive or recognize the hazard. Conversely, a jury could also reasonably conclude that the Lanctoes took appropriate steps to diminish the hazard or that plaintiff did not take appropriate actions to protect her own safety.

Most importantly, however, these are questions of fact for the trier of fact to decide and are not properly decided by the court on a motion for summary disposition or on appellate review.[12] The right to trial by jury is a right protected by our Michigan Constitution.[13] When questions of fact exist, those questions are properly decided by the jury.[14] Thus, this Court not only errs by holding that the case is to be decided as a matter of law, the decision diminishes the role of juries, in favor of judicial fact-finding, in direct contravention of the specific mandates of the Michigan Constitution.

Finally, I share Justice CAVANAGH'S concern that today's holding is "repugnant to the traditional jurisprudence of this Court and a grave disservice to Michigan's citizens and visitors."[15] Accordingly, I dissent.

MARILYN KELLY, J., concurred with HATHAWAY, J.

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[12] See *Nowland v Rice's Estate*, 138 Mich 146, 148; 101 NW 214 (1904); *In re Stebbins Estate*, 94 Mich 304, 307-308; 54 NW 159 (1892).

[13] Const 1963, art 1, § 14.

[14] *Nowland*, 138 Mich at 148; *Stebbins*, 94 Mich at 308.

[15] *Ante* at 487.

SPECTRUM HEALTH HOSPITALS v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

PROGRESSIVE MARATHON INSURANCE COMPANY v DeYOUNG

Docket Nos. 142874 and 143330. Argued March 6, 2012 (Calendar Nos. 1 and 2). Decided July 31, 2012.

Spectrum Health Hospitals brought an action in the Kent Circuit Court against Farm Bureau Mutual Insurance Company of Michigan and Farm Bureau General Insurance Company of Michigan (collectively "Farm Bureau") to recover payment for medical services it had rendered to Craig Smith, Jr., for injuries he had incurred by driving a vehicle insured by Farm Bureau into a tree. The vehicle belonged to Smith's father, who had allowed Smith's girlfriend, Kathleen Chirco, to use it on the condition that she not allow Smith to drive it. Although Smith knew he was forbidden to use the vehicle and did not have a valid driver's license, on the day of the accident he had convinced Chirco to give him the keys. In response to Spectrum Health's motion for summary disposition, Farm Bureau argued that Smith was not entitled to personal protection insurance (PIP) benefits because he had taken the vehicle unlawfully under MCL 500.3113(a). The circuit court, Dennis B. Leiber, J., granted summary disposition in favor of Spectrum Health, ruling that Smith's taking of the vehicle was not unlawful because Chirco had given him permission to drive it. The Court of Appeals, OWENS, P.J., and MARKEY and METER, JJ., affirmed in an unpublished opinion per curiam issued February 4, 2011 (Docket No. 296976), applying the chain-of-permissive-use theory from *Bronson Methodist Hosp v Forshee*, 198 Mich App 617 (1993), to conclude that Smith had not taken the vehicle unlawfully. The Supreme Court granted Farm Bureau's application for leave to appeal. 490 Mich 869 (2011).

Progressive Marathon Insurance Company brought a declaratory action against Ryan DeYoung (DeYoung) and his wife, Nicole DeYoung, in the Ottawa Circuit Court, seeking a ruling that it was not required to provide PIP benefits to DeYoung for injuries he had incurred while driving his wife's vehicle, which was insured through a Progressive policy that listed DeYoung as an excluded driver. On the night of the accident, DeYoung had taken his wife's vehicle without her permission and against her standing instructions. Spectrum Health and Mary Free Bed Rehabilitation Hospital intervened as cross-plaintiffs

to recover payment from Progressive for the outstanding medical bills DeYoung had incurred. Spectrum Health and Mary Free Bed also filed a claim with the Michigan Assigned Claims Facility, which designated Citizens Insurance Company of America to respond to DeYoung's claim. Citizens also denied coverage, and Progressive named Citizens as a cross-defendant. Progressive moved for summary disposition, contending that MCL 500.3113(a) precluded DeYoung from receiving PIP benefits because at the time of the accident DeYoung was using a vehicle that he had taken unlawfully and without a reasonable belief that he was entitled to do so. The circuit court, Jon A. Van Allsburg, J., granted summary disposition to both Progressive and Citizens, ruling that although the Court of Appeals had recognized and applied the exception to MCL 500.3113(a) created by the plurality opinion in *Priesman v Meridian Mut Ins Co*, 441 Mich 60 (1992), allowing PIP benefits for family members who used a vehicle without permission but without the intent to steal it, there were no cases extending this exception (known as the family-joyriding exception) to a named excluded driver on the underlying no-fault policy. The Court of Appeals, HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ., reversed in an unpublished opinion per curiam issued May 24, 2011 (Docket No. 296502), concluding that it was bound in this case to follow the Court of Appeals decisions recognizing and applying the family-joyriding exception. The Supreme Court granted Progressive's application for leave to appeal. 490 Mich 869 (2011).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN and MARY BETH KELLY, the Supreme Court *held*:

Any person who takes a vehicle contrary to a provision of the Michigan Penal Code, including the provisions that prohibit taking a motor vehicle without the intent to steal it, has taken the vehicle unlawfully for purposes of MCL 500.3113(a) and is prohibited from receiving PIP benefits for injuries arising from the vehicle's use, regardless of whether that person is related to the vehicle's owner. The chain-of-permissive-use theory, which presumes that a vehicle owner who authorized the vehicle's use by a person who allowed a third person to use it also authorized the third person's use, is inconsistent with MCL 500.3113(a). To the extent that *Bronson* held otherwise, it is overruled.

1. MCL 500.3113 states in relevant part that a person is not entitled to be paid PIP benefits for accidental bodily injury if at the time of the accident the person was using a motor vehicle that he or she had taken unlawfully unless the person reasonably believed that he or she was entitled to take and use the vehicle. The no-fault act, MCL 500.3101 *et seq.*, does not define the phrase

"taken unlawfully," but the plain meaning of the phrase includes a situation in which an individual gained possession of a vehicle contrary to Michigan law. The Michigan Penal Code contains several statutes that prohibit takings, including MCL 750.413, which prohibits a person from willfully and without authority taking possession of and driving or taking away any motor vehicle belonging to another, and MCL 750.414, which prohibits a person from taking or using without authority any motor vehicle without the intent to steal it. Both joyriding statutes make it unlawful to take any motor vehicle without authority, which effectively defines an unlawful taking of a vehicle for purposes of MCL 500.3113(a) as one that is unauthorized. Because a taking does not have to be larcenous to be unlawful, the phrase "taken unlawfully" in MCL 500.3113(a) applies to anyone who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it.

2. The chain-of-permissive-use theory set forth in *Bronson* and applied by the Court of Appeals in *Spectrum Health* is inconsistent with the language of MCL 500.3113(a). This theory provides that when an owner loans the vehicle to another, it is foreseeable that the borrower may subsequently lend the vehicle to a third party and that the subsequent borrowing is by implication with the owner's consent, constituting an unbroken chain of permissive use. The theory, however, was developed in the context of determining what constituted consent for purposes of the owner's liability statute, MCL 257.401, which provides that a vehicle owner is not liable for injuries caused by the negligent operation of the vehicle unless it was being driven with the owner's express or implied consent or knowledge. *Cowan v Strecker*, 394 Mich 110 (1975), held that under this provision, an owner consents to assumption of the risks attendant on surrendering control of his or her vehicle regardless of admonitions purporting to delimit that consent. *Bronson* erred by applying this theory to the context of MCL 500.3113(a), which is concerned not with placing liability on the proper party, but with precluding the receipt of PIP benefits by someone who has unlawfully taken an automobile. *Bronson* also erred by considering the owner's liability statute, which does not contain the phrase "taken unlawfully," before considering the language of MCL 500.3113(a) itself and by misapplying the owner's-liability caselaw emphasizing that the presumption of consent was rebuttable. *Bronson* was overruled to the extent it is inconsistent with the plain meaning of MCL 500.3113(a). Accordingly, in *Spectrum Health*, MCL 500.3113(a) precluded Smith from receiving PIP benefits regardless of the fact that he took the vehicle from an intermediate user who had the owner's permission

to use it because it is undisputed that the vehicle's owner had expressly forbidden Smith to drive it and a taking does not have to be forcible to be unlawful. The circuit court erred by granting Spectrum Health summary disposition.

3. The family-joyriding exception created in *Priesman* and applied in *Progressive* is not supported by the text of MCL 500.3113(a). *Priesman* erred by relying more on the language of the Uniform Motor Vehicle Accident Reparations Act (UMVARA), on which the no-fault act was based, to interpret MCL 500.3113(a) than on the actual text of MCL 500.3113(a). The only legislative purpose that can be gleaned from the text of MCL 500.3113(a) is the intent to exclude persons who had unlawfully taken vehicles from receiving PIP benefits. Therefore, the plurality opinion in *Priesman* and the decisions applying its family-joyriding exception—*Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244 (1997), *Mester v State Farm Mut Ins Co*, 235 Mich App 84 (1999), *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342 (2005), and *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339 (2009)—are overruled. Because DeYoung was not authorized to use the vehicle in which he was injured, MCL 500.3113(a) excludes him from coverage and Progressive and Citizens were entitled to summary disposition in *Progressive*.

4. The principles of stare decisis do not apply to plurality opinions, such as *Priesman*, or to Court of Appeals decisions, such as those that followed *Priesman*. Because the parties' contractual rights are not affected, the general rule that decisions overruling former decisions of the Supreme Court operate retrospectively applied to *Progressive*.

Spectrum Health reversed and remanded to the circuit court for further proceedings.

Progressive reversed and remanded to the circuit court for further proceedings.

Justice CAVANAGH, joined by Justice MARILYN KELLY in full and by Justice HATHAWAY with respect to *Progressive* only, dissenting, would have reaffirmed the applicability of the chain-of-permissive-use doctrine to MCL 500.3113(a) and the interpretation of MCL 500.3113(a) from *Priesman* that precluded from no-fault coverage only thieves driving stolen vehicles, not those who simply drove a vehicle without express permission and without the intent to steal it. He noted that *Priesman* did not stray from the statutory language and that its consideration of the modifications that the Legislature made to the language it drew from the UMVARA before enacting MCL 500.3113(a) was a logical approach to determining the legislative intent behind that provision. Justice CAVANAGH would have rejected

Butterworth and *Mester* to the extent that they incorrectly concluded that *Priesman* created an exception to the denial of PIP coverage for an unlawful taking by a family member who had no intent to steal the vehicle. He would have eliminated the label "family joyriding exception" because *Priesman* did not create an exception to MCL 500.3113(a), but applied the rules of statutory interpretation to give meaning to the phrase "taken unlawfully" as it is used in that provision. While he agreed that *Priesman* and its progeny were not entitled to stare decisis consideration, reliance interests related to this area of the law strongly counseled against departing from the existing state of the law. He also agreed with Justice HATHAWAY that the Court of Appeals had not clearly erred by holding in *Spectrum Health* that Smith did not unlawfully take the vehicle. Accordingly, he would have affirmed the judgments of the Court of Appeals in both cases.

Justice HATHAWAY, joined by Justice MARILYN KELLY, dissenting, wrote separately regarding *Spectrum Health* to state that she would have affirmed the judgment of the Court of Appeals because it correctly applied the chain-of-permissive-use theory. She stated that it was reasonable to assume that the Legislature intended the term "taken unlawfully" to be applied in terms of consent of the owner and that *Cowan* properly defined what the consent of an owner includes. She further stated that *Bronson*'s chain-of-permissive-use theory was a well-established doctrine that represents a reasonable interpretation of the undefined term "taken unlawfully" given its context within MCL 500.3113(a), was consistent with the policy of the no-fault act to give a source and a means of recovery to those who suffer loss from automobile accidents in this state, and should not have been discarded.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — UNLAWFUL TAKING OF MOTOR VEHICLES — FAMILY-JOYRIDING EXCEPTION.

A person who takes a motor vehicle contrary to a provision of the Michigan Penal Code, MCL 750.1 *et seq.*, has taken the vehicle unlawfully for purposes of MCL 500.3113(a) and is prohibited from receiving personal protection insurance benefits for accidental bodily injury arising from the vehicle's use regardless of whether the person is related to the vehicle's owner or whether the person intended to steal the vehicle.

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — UNLAWFUL TAKING OF MOTOR VEHICLES — PRESUMPTIONS — CONSENT — CHAIN-OF-PERMISSIVE-USE DOCTRINE.

A motor vehicle owner's consent to allow another person to use the vehicle does not give rise to a presumption that the owner has also

consented to the use of the vehicle by a person whom the borrower authorized to use it for purposes of entitling that person to receive personal protection insurance benefits under MCL 500.3113(a).

Miller Johnson (by *Richard E. Hillary, II*, and *Robert J. Christians*) for Spectrum Health Hospitals in *Spectrum Health*.

Willingham & Coté, P.C. (by *Kimberlee A. Hillock* and *John A. Yeager*), for Farm Bureau Mutual Insurance Company of Michigan and Farm Bureau General Insurance Company of Michigan in *Spectrum Health*.

Wheeler Upham, P.C. (by *Nicholas S. Ayoub*), for Progressive Marathon Insurance Company in *Progressive*.

Miller Johnson (by *Richard E. Hillary, II*, and *Michelle L. Quigley*) for Spectrum Health Hospitals in *Progressive*.

Amicus Curiae:

Zausmer, Kaufman, August, Caldwell & Tayler, PC (by *Carson J. Tucker*), for the Insurance Institute of Michigan.

ZAHRA, J. We granted leave in these cases to address the question whether a person injured while driving a motor vehicle that the person had taken contrary to the express prohibition of the owner may avail himself or herself of personal protection insurance benefits (commonly known as "PIP benefits") under the no-fault act,[1] notwithstanding the fact that MCL 500.3113(a) bars a person from receiving PIP benefits for injuries suffered while using a vehicle that he or she "had taken unlaw-

[1] MCL 500.3101 *et seq*.

fully, unless the person reasonably believed that he or she was entitled to take and use the vehicle."

We hold that any person who takes a vehicle contrary to a provision of the Michigan Penal Code[2]—including MCL 750.413 and MCL 750.414, informally known as the "joyriding" statutes—has taken the vehicle unlawfully for purposes of MCL 500.3113(a).[3] We also hold that the use of the phrase "a person" in MCL 500.3113(a) clearly and plainly includes a family member who has taken a vehicle unlawfully, thereby precluding that person from receiving PIP benefits.

In reaching this conclusion, we consider and reject two distinct legal theories that the respective panels of the Court of Appeals applied in concluding that the PIP claimants are not excluded from receiving benefits by MCL 500.3113(a). In *Spectrum Health Hospitals v Farm Bureau Mutual Insurance Co of Michigan* (Docket No. 142874), we examine the "chain of permissive use" theory, which the Court of Appeals initially adopted in *Bronson Methodist Hospital v Forshee*.[4] This theory arises when a vehicle owner authorizes the vehicle's use by another person (the intermediate user), who in turn authorizes a third person (the end user) to use the vehicle. Applying *Bronson* in *Spectrum Health*, the Court of Appeals held that, for the purposes of MCL 500.3113(a), a vehicle owner is presumed to have allowed the end user to take the vehicle, regardless of

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[2] MCL 750.1 *et seq*.

[3] We acknowledge that MCL 500.3113(a) may allow a user who has unlawfully taken the vehicle to receive PIP benefits if the user "reasonably believed that he or she was entitled to take and use the vehicle." However, because no real argument is presented in these cases that the claimants reasonably held these beliefs, we do not address these circumstances, only the meaning of the phrase "taken unlawfully."

[4] *Bronson Methodist Hosp v Forshee*, 198 Mich App 617; 499 NW2d 423 (1993).

whether the owner had expressly forbidden the end user from taking the car.[5] We conclude that *Bronson* erred by applying a theory developed in owner-liability caselaw to the context of MCL 500.3113(a) because this caselaw did not address whether the end user of a vehicle violated the Michigan Penal Code, including MCL 750.413 or MCL 750.414, by unlawfully *taking* a vehicle. Therefore, we overrule *Bronson*'s application of the "chain of permissive use" theory as inconsistent with MCL 500.3113(a). To determine whether the end user in *Spectrum Health* unlawfully took the vehicle, we consider the undisputed facts of this case: the vehicle's owner expressly told the end user that he was not allowed to drive the vehicle. Therefore, we conclude that the Court of Appeals erred by affirming the circuit court's grant of summary disposition to Spectrum Health because MCL 500.3113(a) precludes the claimant from receiving PIP benefits in this case.

In *Progressive Marathon Insurance Co v DeYoung* (Docket No. 143330), we examine the "family joyriding exception" to MCL 500.3113(a). This theory, first articulated in Justice LEVIN's plurality opinion in *Priesman v Meridian Mutual Insurance Co*,[6] involves the unauthorized taking of a person's motor vehicle by a family member who did not intend to steal it. Justice LEVIN opined that the Legislature did not intend that a relative's "joyride" be considered an unlawful taking under MCL 500.3113(a) because, given that most legislators are parents and grandparents, they may have experienced children who used a family vehicle without

[5] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2011 (Docket No. 296976), pp 3-4.

[6] *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992).

permission and may have done so themselves.[7] Thus, he concluded that the Legislature did not truly intend to exclude teenagers who joyride in their relatives' automobiles. Because the family-joyriding exception has no basis in the language of MCL 500.3113(a), we disavow Justice LEVIN's plurality opinion in *Priesman* and overrule the Court of Appeals decisions applying it: *Butterworth Hospital v Farm Bureau Insurance Co*,[8] *Mester v State Farm Mutual Insurance Co*,[9] *Allen v State Farm Mutual Automobile Insurance Co*,[10] and *Roberts v Titan Insurance Co (On Reconsideration)*.[11] Cross-defendants, Progressive Marathon Insurance Company and Citizens Insurance Company of America, are entitled to summary disposition because MCL 500.3113(a) excludes the injured claimant from coverage.

Therefore, in both *Spectrum Health* (Docket No. 142874) and *Progressive* (Docket No. 143330), we reverse the judgments of the Court of Appeals and remand these cases to their respective circuit courts for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEEDINGS

A. *SPECTRUM HEALTH*

PIP claimant Craig Smith, Jr. (Craig Jr.), was injured in a single-car accident that occurred while he was driving a vehicle owned by his father, Craig Smith, Sr. (Craig Sr.),

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[7] *Id*. at 67-68.

[8] *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997).

[9] *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999).

[10] *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342; 708 NW2d 131 (2005).

[11] *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 342; 764 NW2d 304 (2009).

and insured by Farm Bureau Mutual Insurance Company of Michigan and Farm Bureau General Insurance Company of Michigan (collectively "Farm Bureau"). Craig Sr. had forbidden Craig Jr. to operate the vehicle because he had no valid driver's license. Craig Jr. acknowledged that he knew he was forbidden to operate the vehicle. Craig Sr. entrusted the vehicle to Craig Jr.'s girlfriend, Kathleen Chirco, to enable Craig Jr. and Kathleen to perform landscaping services. Nevertheless, Craig Sr. instructed Kathleen, in Craig Jr.'s presence, that she was not to allow Craig Jr. to drive it. That night, Craig Jr. began drinking and asked Kathleen for the keys to Craig Sr.'s vehicle. Although she initially resisted, Kathleen eventually gave him the keys, and he later crashed the vehicle into a tree. Craig Jr. pleaded no contest to operating while intoxicated causing serious injury, MCL 257.625, and was sentenced to a minimum of 2½ years in prison.

Spectrum Health Hospitals, which rendered care to Craig Jr., brought suit against Farm Bureau to recover payment for those services and subsequently moved for summary disposition. Farm Bureau opposed Spectrum Health's motion and took the position that Craig Jr. was not entitled to PIP benefits because the vehicle he was using had been taken unlawfully. The circuit court granted summary disposition in favor of Spectrum Health, ruling that Kathleen had been empowered to permit Craig Jr. to operate the vehicle. The Court of Appeals affirmed, applying the chain-of-permissive-use theory from *Bronson* to conclude that Craig Jr. had not taken the vehicle unlawfully.[12]

This Court granted Farm Bureau's application for leave to appeal, requesting the parties to address

> whether an immediate family member who knows that he or she has been forbidden to drive a vehicle may neverthe-

[12] *Spectrum*, unpub op at 3-4.

> less be a permissive user of the vehicle eligible for [PIP] benefits under MCL 500.3113(a) when, contrary to the owner's prohibition, an intermediate permissive user grants the [PIP] claimant permission to operate the accident vehicle.[13]

B. *PROGRESSIVE*

By age 26, Ryan DeYoung had accumulated three drunk-driving convictions, which resulted in the repeated loss of his valid driver's license beginning at age 17. Ryan's wife, Nicole DeYoung, owned and insured the family's four vehicles with Progressive Marathon Insurance Company. Ryan was a named excluded driver on the Progressive policy. As a result, Nicole expressly prohibited Ryan from driving the vehicles, including the 2001 Oldsmobile Bravada that she used as her principal vehicle. On the night of September 17, 2008, Ryan came home intoxicated and without his house key. He banged on the window of their home. Nicole rose from her bed, admitted him, and, perceiving his intoxicated state, went back to bed. Ryan took the key to the Bravada out of Nicole's purse and then took the vehicle, contrary to Nicole's standing instructions and without her permission.

Within 20 minutes of taking Nicole's vehicle, Ryan was badly injured in a single-car accident. He incurred bills of more than $53,000 at Spectrum Health Hospitals and another $232,000 at Mary Free Bed Rehabilitation Hospital. Progressive denied PIP benefits, arguing that Ryan had been injured while using a vehicle that he had unlawfully taken. It commenced a declaratory action against Ryan and Nicole on this basis. Spectrum Health and Mary Free Bed intervened as cross-plaintiffs to recover payment from Progressive for

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[13] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 490 Mich 869 (2011).

the outstanding bills. Spectrum Health and Mary Free Bed also filed a claim with the Michigan Assigned Claims Facility, which designated Citizens Insurance Company of America to respond to Ryan's claim. Citizens also denied coverage, and Progressive named Citizens as a cross-defendant in this lawsuit.

Progressive moved for summary disposition, contending that at the time of the accident Ryan was using a motor vehicle that he had taken unlawfully and without a reasonable belief that he was entitled to do so, which precluded him from receiving PIP benefits under MCL 500.3113(a). The circuit court granted summary disposition to both Progressive and Citizens, ruling that although the Court of Appeals decisions recognizing and applying the family-joyriding exception were binding precedent, none had extended the exception to a case in which the family member was a named excluded driver on the underlying no-fault policy. The circuit court concluded that "[t]o further extend the 'joyriding' exception so as to overturn excluded driver provisions is to increase the risk in all such policies, and may result in good drivers with uninsurable family members (due to excessive risk associated with poor driving records) becoming uninsurable themselves." The circuit court concluded that it would "not engage in such rewriting of private contracts."

The Court of Appeals reversed, concluding that it had no alternative but to follow the binding precedent of prior Court of Appeals decisions recognizing and applying the family-joyriding exception to the disqualification from coverage of MCL 500.3113(a).[14]

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[14] *Progressive Marathon Ins Co v DeYoung*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 296502), pp 4-5.

We granted Progressive's application for leave to appeal, requesting that the parties address

> (1) whether an immediate family member who knows that he or she has been forbidden to drive a vehicle, and has been named in the no-fault insurance policy applicable to the vehicle as an excluded driver, but who nevertheless operates the vehicle and sustains personal injury in an accident while doing so, comes within the so-called "family joyriding exception" to MCL 500.3113(a); and (2) if so, whether the "family joyriding exception" should be limited or overruled.[15]

II. STANDARD OF REVIEW

These cases involve the interpretation of MCL 500.3113(a). Issues of statutory interpretation are questions of law that this Court reviews de novo.[16] In examining MCL 500.3113(a), we must apply our longstanding principles of statutory interpretation:

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, "[t]he words of a statute provide 'the most reliable evidence of its intent . . . .' "[17]

A circuit court's decision on a motion for summary disposition is also reviewed de novo.[18]

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[15] *Progressive Marathon Ins Co v DeYoung*, 490 Mich 869 (2011).

[16] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011) (citations and quotation marks omitted).

[17] *Id.* at 156-157 (citations omitted).

[18] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. ANALYSIS

MCL 500.3113 excludes certain people from entitlement to PIP benefits. It states in relevant part:

> A person is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
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> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

Each of these cases involves a Court of Appeals decision not to apply the PIP benefits exclusion in MCL 500.3113(a) to the underlying claimant. In *Spectrum Health*, the Court of Appeals applied the chain-of-permissive-use theory articulated in *Bronson*[19] to conclude that Craig Jr. was a permissive user of the vehicle notwithstanding the fact that his father had expressly forbidden him to drive the vehicle. In *Progressive*, the Court of Appeals applied the family-joyriding exception articulated in Justice LEVIN's plurality opinion in *Priesman*[20] to conclude that MCL 500.3113(a) did not exclude the claimant after he took his wife's vehicle contrary to her standing prohibition. Both of these theories purport to limit application of the phrase "taken unlawfully" in MCL 500.3113(a).

In determining the Legislature's intended meaning of the phrase "taken unlawfully," we must accord the phrase its plain and ordinary meaning, and we may consult dictionary definitions because the no-fault act does not define the phrase.[21] The word "unlawful"

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[19] *Bronson*, 198 Mich App at 624-625.

[20] *Priesman*, 441 Mich at 60 (opinion by LEVIN, J.).

[21] *Krohn*, 490 Mich at 156.

commonly means "not lawful; contrary to law; illegal,"[22] and the word "take" is commonly understood as "to get into one's hands or possession by voluntary action."[23] When the words are considered together, the plain meaning of the phrase "taken unlawfully" readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law.

The Michigan Penal Code contains several statutes that prohibit "takings," including two that prohibit "joyriding," MCL 750.413 and MCL 750.414. MCL 750.413 states that "[a]ny person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . ." Similarly, MCL 750.414 provides in pertinent part that "[a]ny person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor . . . ."[24] Thus, both joyriding statutes make it unlawful to take any motor vehicle without authority,

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[22] *Random House Webster's College Dictionary* (2000). Justice CAVANAGH's dissenting opinion claims "there is no indication that it is proper to resort to the Penal Code to give meaning to a specific phrase in the no-fault act." *Post* at 542. However, in this context, the term "unlawful" can only refer to the Michigan Penal Code, and Justice CAVANAGH tacitly admits this point by opining that the term "taken unlawfully" refers to "car thieves." *Post* at 544 (emphasis omitted).

[23] *Id*.

[24] MCL 750.414 contains disjunctive prohibitions: it prohibits someone from "tak[ing]" a motor vehicle "without authority" and, alternatively, it prohibits someone from "us[ing]" a motor vehicle "without authority." Thus, it is possible to violate MCL 750.414 without unlawfully *taking* the vehicle and, as a result, not all violations of MCL 750.414 necessarily constitute unlawful *takings* within the meaning of MCL 500.3113(a). Nevertheless, a taking that violates MCL 750.414 qualifies for the exclusion under MCL 500.3113(a) because it is an *unlawful* taking.

effectively defining an unlawful taking of a vehicle as that which is unauthorized.[25]

Because a taking does not have to be larcenous to be unlawful, the phrase "taken unlawfully" in MCL 500.3113(a) applies to *anyone* who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it.[26] With this statutory interpretation in mind, we consider seriatim the theories that the two Court of Appeals panels applied in these cases.

A. *SPECTRUM HEALTH* AND THE "CHAIN OF PERMISSIVE USE" THEORY

In *Spectrum Health*, the Court of Appeals applied the "chain of permissive use" theory from *Bronson* to allow

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[25] The "authority" referred to in the joyriding statutes is obviously the authority of the owner of the vehicle. Accordingly, for purposes of MCL 500.3113(a), a vehicle is "unlawfully taken" if it is taken without the authority of its owner. See *Farmers Ins Exch v Young*, 489 Mich 909 (2011) (MARKMAN, J., concurring) ("[MCL 500.3113(a)] requires a threshold determination that a vehicle was 'unlawfully taken' from its *owner*."). Therefore, MCL 500.3113(a) does not apply to the lawful owner of a vehicle, even if that person drives it under a circumstance that renders him or her legally unable to operate a vehicle. However, driving while legally unable may have implications under MCL 500.3113(a) for a person who *has* taken a vehicle unlawfully because "as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431-432; 766 NW2d 878 (2009).

[26] Otherwise, it would have been unnecessary for the Legislature to have created an exception that allows an injured person to recover PIP benefits when he or she "reasonably believed that he or she was entitled to take and use the vehicle." See *Priesman*, 441 Mich at 76 (GRIFFIN, J., dissenting).

Justice HATHAWAY's dissenting opinion claims that this interpretation "precludes a class of injured parties from recovering PIP benefits even when a party was given permission to take a car by an intermediate user." *Post* at 552. This is incorrect because we are only interpreting the phrase "taken unlawfully" in MCL 500.3113(a). An end user who takes a vehicle without authority can still recover PIP benefits as long as he or she "reasonably believed that he or she was entitled to take and use the vehicle." MCL 500.3113(a).

the injured claimant to recover PIP benefits. In *Bronson*, the injured claimant, Mark Forshee, was drinking beer and taking controlled substances with three friends, Thomas Pefley, William Morrow, and Brian Antles.[27] The group was traveling in a car driven by Pefley and owned by his father, who had expressly indicated that only his son could drive the vehicle and who had expressly forbidden Forshee from doing so.[28] The police stopped the car and arrested Pefley for violating his probation by carrying a concealed weapon. Pefley yelled from the police car for Morrow to "take the car home."[29] When the police left with Pefley, Morrow began driving the car. After taking Antles home, Morrow and Forshee purchased a case of beer and continued to use the car.[30] Morrow later allowed Forshee to drive.[31]

Later that night, another police officer saw the car speeding and signaled the driver to stop.[32] Forshee instead accelerated and a high-speed chase ensued, ending when the car struck an embankment, ricocheted off a metal post, and landed some 50 feet away.[33] Following a bench trial, the circuit court held in part that Forshee was not eligible for no-fault benefits because he had unlawfully taken the motor vehicle within the meaning of MCL 500.3113(a).[34]

The *Bronson* Court reversed and concluded that Forshee was entitled to recover PIP benefits. After observing the lack of caselaw interpreting the "unlaw-

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[27] *Bronson*, 198 Mich App at 620.

[28] *Id.* at 625.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 621.

[32] *Id*. at 620-621.

[33] *Id*. at 621.

[34] *Id*. at 621-622.

ful taking" language in MCL 500.3113(a), the *Bronson* Court turned for "guidance [to] the decisions that have construed whether a vehicle was taken with consent for purposes of the owner's liability statute, MCL 257.401."[35] Specifically, the Court considered this Court's decision in *Cowan v Strecker*[36] and determined that we have "interpreted 'consent' broadly" in the context of an owner's vicarious liability.[37] *Bronson* then held that an owner " ' "consents" to assumption of the risks attendant upon his surrender of control regardless of admonitions which would purport to delimit his consent.' "[38]

While *Bronson* recognized that MCL 500.3113(a) "is not concerned with placing the liability of [sic] the proper party, but, rather, with precluding the receipt of [PIP] benefits by someone who has unlawfully taken an automobile,"[39] it nevertheless adopted *Cowan*'s "broad definition of 'consent' " as "of equal applicability" in the no-fault context.[40] In applying this broad definition of consent, the *Bronson* Court observed that "when an owner loans his vehicle to another, it is foreseeable that the borrower may thereafter lend the vehicle to a third party" and concluded that "such further borrowing of the vehicle by the third party is, by implication, with

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[35] *Id.* at 623. MCL 257.401(1) states in part:

> The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

[36] *Cowan v Strecker*, 394 Mich 110, 229 NW2d 302 (1975).

[37] *Bronson*, 198 Mich App at 623.

[38] *Id.* at 624, quoting *Cowan*, 394 Mich at 115.

[39] *Bronson*, 198 Mich App at 624.

[40] *Id.*

the consent of the owner."[41] This "unbroken chain of permissive use" renders inapplicable the "unlawful taking" exclusion of MCL 500.3113(a).[42]

We hold that the *Bronson* Court's "chain of permissive use" theory is inconsistent with the statutory language of the no-fault act. In articulating its theory, *Bronson* first looked to *another* statutory scheme, the owner's liability statute, to interpret the meaning of MCL 500.3113(a). However, the first step of statutory interpretation is to review the language of the statute at issue, not that of another statute. Indeed, the relevant phrase in MCL 500.3113(a) that we must interpret, "taken unlawfully," does not appear in the owner's liability statute that *Bronson* considered analogous.

The owner's liability statute, MCL 257.401, differs from the no-fault act in several important respects.[43] In particular, it explains that the owner "is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge."[44] The owner's liability statute, therefore, considers not just an

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[41] *Id*. at 625.

[42] *Id.*

[43] MCL 257.401(1) provides:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

[44] *Id*.

owner's consent but also the owner's knowledge, which is much broader than the focus in MCL 500.3113(a) on whether the taking was unlawful. Indeed, the owner's liability statute does not speak in terms of lawfulness or unlawfulness. Moreover, MCL 500.3113(a) does not contain language regarding *an owner's* "express or implied consent or knowledge" because it examines the legality of the taking from the *driver's* perspective—a perspective that the owner's liability statute lacks. Therefore, MCL 500.3113(a) does not incorporate from the owner's liability statute the presumption regarding an owner's consent or knowledge that determines a driver's statutory vicarious liability.

Not only did the *Bronson* Court err by analogizing the owner's liability statute to the no-fault act, it erroneously applied this Court's caselaw interpreting the owner's liability statute. *Cowan* indeed articulated a broad conception of consent in attempting to interpret the broad language in the owner's liability statute.[45] However, *Bronson*'s complete reliance on *Cowan* is in conflict with other Michigan Supreme Court precedent discussing a vehicle owner's vicarious liability. In *Fout v Dietz*, this Court emphasized that the holding in *Cowan* provided for an owner's liability when "the owner had initially given consent to the operation of his motor vehicle by others and then had *subsequently* sought, unsuccessfully, to place restrictions on that operation."[46] However, *Fout* also emphasized that a party may present evidence to "rebut[] the common-law presumption that the vehicle in question was being operated with the express or implied consent of the owner" at the time of the accident.[47]

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[45] *Cowan*, 394 Mich 110.

[46] *Fout v Dietz*, 401 Mich 403, 406; 258 NW2d 53 (1977) (emphasis added).

[47] *Id*.

Furthermore, in *Bieszck v Avis Rent-a-Car System, Inc*, this Court held that a rental contract forbidding anyone under age 25 from operating the rented vehicle conclusively rebutted the presumption that the 21-year-old driver was operating the vehicle with the owner's express or implied consent.[48] The Court reiterated that the common law and the owner's liability statute merely *presumed* that an owner has consented to the operation of a vehicle that was voluntarily given to someone else, a presumption that can be rebutted with " 'positive, unequivocal, strong and credible evidence' " that a particular use was outside the scope of the consent.[49]

For all these reasons, we believe that the "chain of permissive use" theory set forth in *Bronson* does not faithfully apply the standard articulated in MCL 500.3113(a) to determine whether the claimant "had taken [the vehicle] unlawfully." Therefore, we overrule *Bronson* to the extent it is inconsistent with the plain meaning of MCL 500.3113(a). In examining whether a taking is unlawful within the meaning of MCL 500.3113(a), it is irrelevant whether the taking would have subjected the vehicle's owner to vicarious liability under MCL 257.401. What is relevant to this determination is whether the taking was "without authority" within the meaning of MCL 750.413 or MCL 750.414. If so, then the taking was "unlawful" within the meaning of MCL 500.3113(a).[50]

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[48] *Bieszck v Avis Rent-a-Car Sys, Inc*, 459 Mich 9; 583 NW2d 691 (1998).

[49] *Id.* at 19 (citation omitted).

[50] Justice HATHAWAY's dissenting opinion criticizes as "look[ing] outside the text of MCL 500.3113(a)," *post* at 551, the fact that this opinion considers whether a taking violates the criminal joyriding statutes in determining whether an unlawful taking has occurred within the meaning of MCL 500.3113(a). This criticism misses the mark because MCL

In applying this principle of law to the facts of this case, we conclude that there is no factual dispute that Craig Sr. gave his consent only to allow Kathleen to use the vehicle and, at the same time, expressly instructed both Kathleen and Craig Jr. that Craig Jr. was not allowed to take and use the vehicle. Thus, Craig Jr. admitted that he had express knowledge that Craig Sr. did not give him consent to take and use the vehicle. As a result, Craig Jr. took his father's vehicle without authority contrary to MCL 750.414 and, therefore, took it unlawfully within the meaning of MCL 500.3113(a).

Spectrum Health argues that Craig Jr. did not unlawfully take the vehicle because Kathleen had given him permission to take it. We disagree because a taking does not have to be forcible to be unlawful. Given the undisputed fact that Craig Jr. took the vehicle *contrary to the express prohibition of the vehicle's owner* (his father), Spectrum Health provides no legal support for its conclusion that Craig Jr.'s actions did not violate MCL 750.414. Accordingly, the circuit court and Court of Appeals erred by granting Spectrum Health's motion for summary disposition because MCL 500.3113(a) precludes PIP benefits in this case.[51] We reverse the lower court judgments and remand this case to the circuit court for further proceedings consistent with this opinion.

500.3113(a) specifically discusses the taking in terms of whether it was "unlawful," and our criminal joyriding statutes consider a taking to be unlawful when it is done "without authority."

[51] Spectrum Health is not entitled to summary disposition on the alternative basis of the family-joyriding exception because that exception is also inconsistent with MCL 500.3113(a) for the reasons we explain in part III(B) of this opinion. Moreover, the same facts that show that Craig Jr. had taken his father's vehicle unlawfully establish that Craig Jr. could not have reasonably believed that he was entitled to take and use the vehicle. Therefore, MCL 500.3113(a) precludes PIP benefits in this case.

B. *PROGRESSIVE* AND THE "FAMILY JOYRIDING" EXCEPTION

In *Progressive*, the Court of Appeals applied the "family joyriding" exception, first articulated in Justice LEVIN's plurality opinion in *Priesman*,[52] to conclude that MCL 500.3113(a) did not exclude the claimant from receiving PIP benefits for taking his wife's vehicle contrary to her standing instruction. *Priesman* involved the motor vehicle accident of the vehicle owner's 14-year-old son, Corey, who had taken the vehicle without her permission.[53] The mother's no-fault insurer refused payment pursuant to MCL 500.3113(a), claiming that Corey had unlawfully taken the vehicle.[54] The circuit court granted the insurer's motion for summary disposition, finding no dispute that Corey had violated MCL 750.414 by taking his mother's vehicle without permission.[55] The Court of Appeals reversed the circuit court, concluding that Corey's use "was not unlawful under the no-fault act" and stating, "We cannot say that the Legislature intended that [MCL 500.3113(a)] would apply under the circumstances of this case."[56]

This Court granted leave to appeal,[57] although no majority holding resulted regarding the interpretation of MCL 500.3113(a). In concluding that MCL 500.3113(a) does not apply to a family member's joy-

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[52] *Priesman*, 441 Mich at 60 (opinion by LEVIN, J.).

[53] *Id.* at 62.

[54] *Id.*

[55] *Id.* At that time, MCL 750.414 provided, in relevant part: "Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who shall be a party to such unauthorized taking or using, shall upon conviction thereof be guilty of a misdemeanor . . . ." Although MCL 750.414 was amended by 2002 PA 672, the alterations to the quoted language were not substantive.

[56] *Priesman v Meridian Mut Ins Co*, 185 Mich App 123, 126; 460 NW2d 244 (1990).

[57] *Priesman v Meridian Mut Ins Co*, 439 Mich 867 (1991).

ride, Justice LEVIN's plurality opinion first identified other provisions in the no-fault act providing for PIP benefits

> unlimited in amount for every person, including even a person who does not insure a vehicle he owns (except when driving that vehicle) and the spouse and relatives domiciled in the household of the owner of an uninsured vehicle even when driving or riding as a passenger in that uninsured vehicle . . . .[58]

The plurality opinion then looked to the Uniform Motor Vehicle Accident Reparations Act (UMVARA) and explained that the UMVARA "excepts from coverage a 'converter'—a person who steals—unless covered under a no-fault policy issued to the converter or a spouse or other relative in the same household."[59] While the Legislature substituted "taken unlawfully" for "converts" in the UMVARA, the plurality explained the significance of this substitution as only reflecting the Legislature's intent to "except from no-fault coverage thieves while driving stolen vehicles even if they or a spouse or relative had purchased no-fault insurance."[60] The plurality did not believe that the substitution showed the intent to except joyriders from coverage.[61] Rather, the plurality believed that the Legislature

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[58] *Priesman*, 441 Mich at 65 (opinion by LEVIN, J.) (emphasis omitted). Justice BOYLE concurred only in the result of Justice LEVIN's opinion.

[59] We stress the sequence of the analysis in *Priesman* to highlight the flawed statutory interpretation that Justice LEVIN's plurality opinion undertook. Rather than reviewing the words of the relevant provision, the opinion instead based its interpretation on the uniform statutory language that the Legislature had rejected in order to further what it considered to be the general purpose of the no-fault act to award unlimited no-fault benefits to family members of insureds. See *id*. at 64-66.

[60] *Id.* at 67.

[61] *Id*.

seemingly intended to "simplif[y] the complex verbiage of the no-fault exception, and thereby avoid[] litigation concerning what constitutes 'conversion,' a term of art in criminal and personal property law."[62] Thus, the plurality concluded that the legislative decision to substitute the phrase "taken unlawfully" for the proposed UMVARA term "converts" did not indicate "any substantial difference in scope or meaning."[63]

The plurality, however, did not specifically define the phrase "taken unlawfully" as pertaining exclusively to thieves, but concluded instead that the phrase did *not* include joyriding teenage family members, stating:

> We are not persuaded that legislators, sitting at a drafting session, concluded that the evil against which the UMVARA exception was aimed was not adequate because it did not cover teenagers who "joyride" in their parents' automobiles, especially automobiles covered by no-fault insurance, in the context that countless persons would be entitled, under the legislation they were drafting, to no-fault benefits without regard to whether they are obliged to purchase no-fault insurance or, if obliged to insure, do in fact do so.[64]

Subsequent Court of Appeals panels interpreted this "family joyriding" exception. In *Butterworth*, the Court examined *Priesman* and MCL 500.3113(a) to determine whether that provision applied to an adult family member who did not live with his parents.[65] While the Court recognized that "the precedential value of *Priesman* is . . . somewhat problematic," the Court felt "com-

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[62] *Id*.

[63] *Id*. The plurality opinion also relied on a secondary source, which interpreted the "Michigan provision [MCL 500.3113(a)] as excepting a person injured in an automobile that he has 'stolen.' " *Id.* at 68, citing Keeton & Widiss, Insurance Law, § 410, p 422.

[64] *Priesman*, 441 Mich at 68.

[65] *Butterworth*, 225 Mich App 244.

pelled to follow it."[66] The panel thus concluded that the unlawful-taking exclusion in MCL 500.3113(a) "does not apply to cases where the person taking the vehicle unlawfully is a family member doing so without the intent to steal but, instead, doing so for joyriding purposes."[67] The panel rejected the insurer's claim that the joyriding exception should not extend to a joyrider who had been expressly prohibited by the owner from driving the vehicle, reasoning that the joyrider's intent remained only to borrow the vehicle, not to steal it.[68] The panel also rejected the insurer's claim that the joyriding exception should not extend to users who take a vehicle knowing that they are "physically incapable of operating the vehicle safely and . . . not entitled to be a licensed driver."[69] Last, the panel rejected the insurer's claim that the joyriding exception should not extend to adult joyriders who lived apart from their parents at the time of the accident. The panel concluded that the age of the joyrider had no legal significance given *Priesman*'s focus on "the fact that the driver was a family member who merely intended to joyride."[70]

Later, the Court of Appeals in *Mester* declined "to extend the *Priesman* holding to apply to *anyone* who is merely joyriding."[71] The panel considered, but ultimately rejected, Judge HOEKSTRA's concurring opinion in *Butterworth*, which had interpreted *Priesman* for the broad proposition that "the legislators intended to except from [PIP] benefits only persons injured while

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[66] *Id.* at 249.

[67] *Id.*

[68] *Id.* at 249-250.

[69] *Id.* at 250.

[70] *Id.* at 251.

[71] *Mester*, 235 Mich App at 88 (emphasis added).

driving a car they intended to *steal* . . . ."[72] The *Mester* panel explained that "the justices of the Supreme Court who recognized a joyriding exception in the *Priesman* case did so not because joyriding does not involve an unlawful taking, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member."[73] In *Allen*, the Court of Appeals reaffirmed *Mester*'s limitation of the family-joyriding exception to motor vehicle users who were related to the owners.[74]

Finally, in *Roberts*, an inebriated 12-year-old, Kyle Roberts, was injured while driving his landlord's vehicle, which Kyle's mother had been allowed to use on a regular basis.[75] Relying on the no-fault act's definition of "owner" in MCL 500.3101 and the Court of Appeals' previous recognition that "there may be more than one 'owner' of a vehicle,"[76] the majority concluded that Kyle's mother was properly considered an owner of the vehicle. As a result, the family-joyriding exception allowed Kyle to claim PIP benefits.[77]

As stated, Justice LEVIN's plurality opinion in *Priesman* is the only instance in which this Court addressed the "taken unlawfully" language in MCL 500.3113(a). It is axiomatic that the *first step* of statutory interpretation is to review the language of the statute itself. Yet *Priesman* relied more on the language of the UMVARA and its commentary to interpret MCL 500.3113(a) than on the actual text of MCL 500.3113(a) enacted by the Legislature.

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[72] *Butterworth*, 225 Mich App at 253 (HOEKSTRA, J., concurring).

[73] *Mester*, 235 Mich App at 88.

[74] *Allen*, 268 Mich App at 347-348.

[75] *Roberts*, 282 Mich App at 342.

[76] *Id*. at 354-355.

[77] *Id*.

This Court has previously expressed disapproval of relying on model acts to interpret existing statutes rather than on the clear language of the actual statutes at issue. In *Jarrad v Integon National Insurance Co*,[78] we overruled the Court of Appeals' decision in *Spencer v Hartford Accident & Indemnity Co*,[79] which had interpreted the phrase "other health and accident coverage" in MCL 500.3109a by reference to the UMVARA. In *Spencer*, the plaintiff was injured in a motor vehicle accident during work and sought no-fault benefits.[80] The insurer argued that the wage-continuation benefits the plaintiff received pursuant to a union agreement were "other health and accident coverage" under MCL 500.3109a and were therefore subject to coordination with no-fault benefits.[81] The court referred to the counterpart language in the UMVARA and compared it with the statutory text.[82] The model language provided that PIP benefits were to be coordinated with " 'loss otherwise compensated by benefits or advantages a person receives or is unconditionally entitled to receive from any other specified source . . . .' "[83] The Court of Appeals also found it "clear from the comments that, under the UMVARA, wage continuation benefits pursuant to a union agreement were intended to be coordinated with no-fault benefits otherwise payable."[84]

The *Spencer* Court held in this regard that

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[78] *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207; 696 NW2d 621 (2005).

[79] *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389; 445 NW2d 520 (1989).

[80] *Id*. at 391.

[81] *Id*. at 395.

[82] *Id*. at 398-399.

[83] *Id*. at 399.

[84] *Id*. at 400.

> [i]nstead of adopting the broader language of the uniform act, . . . the Michigan act was drafted much more narrowly, and limited coordination to "other health and accident coverage." It appears, therefore, that in enacting the Michigan act the Legislature did not intend for no-fault benefits to be coordinated with a broad array of other benefits which may perhaps be equally duplicative.[85]

In response to this holding, this Court emphasized in *Jarrad* "that a court's fundamental interpretive obligation is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute."[86] And we stated that the *Spencer* Court simply had not analyzed the language of the statute. Rather, *Spencer* had perfunctorily held that "(1) the statute is narrower than the model provision, and (2) the statute must therefore produce a different outcome than the model provision would generate."[87] We explained that "[a] court may not simply announce that the text of a statute differs from the language in a model act . . . as an excuse to avoid the court's duty to interpret the statutory text adopted by the Legislature."[88]

The plurality opinion in *Priesman* appears to have embraced the erroneous method of statutory interpretation advanced by the Court of Appeals in *Spencer* and subsequently rejected by this Court in *Jarrad*.[89] Rather

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[85] *Id*.

[86] *Jarrad*, 472 Mich at 221, citing *Koontz v Ameritech Serv, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[87] *Jarrad*, 472 Mich at 222.

[88] *Id*. at 223 (emphasis omitted).

[89] Justice CAVANAGH's dissenting opinion notes that "this Court has previously looked to the UMVARA as a source of guidance in construing provisions of the no-fault act." *Post* at 540. However, in two of the cases cited, the language of the UMVARA was the same as the language of the Michigan provisions under consideration. See *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984) (stating that MCL 500.3107(b) is "virtually identical" to the corresponding provision of the

UMVARA), and *Thornton v Allstate Ins Co*, 425 Mich 643, 657; 391 NW2d 320 (1986) (construing the phrase "arising out of the use of a motor vehicle as a motor vehicle" in MCL 500.3105, which is identical to the corresponding provision in the UMVARA).

The third case, *Donajkowski v Alpena Power Co*, 460 Mich 243; 596 NW2d 574 (1999), is clearly distinguishable. This Court recognized that Michigan common law prohibited an intentional tortfeasor from seeking contribution. *Id*. at 249. The Legislature enacted a contribution statute, MCL 600.2925a(1), which provided in part that " 'when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them . . . .' " *Id*. at 247. This Court properly concluded that the Legislature did not intend any limitation or prohibition concerning intentional tortfeasors. *Id*. at 250. Indeed, the statute refers to liability "in tort" including "wrongful death," which obviously may include an intentional tort. This Court only noted that MCL 600.2925a(1) "was based upon the model contribution act that itself retained the prohibition recognized in our common law . . . ." *Id*. at 257 n 14. The Court simply pointed out that "[t]he fact that our Legislature did not include this restriction in adopting its version of the model contribution act is significant to any good-faith effort to give meaning to the Legislature's intent." *Id*. *Donajkowski* relied on the absence of language in MCL 600.2925a(1) because it differed from the Michigan common-law rule. That the model contribution act included this common-law distinction merely supported the Court's conclusion. *Donajkowski* is clearly distinguishable because the enacted statutory language at issue here is different from that of the UMVARA, not omitted.

More important is that in none of these cases did this Court find that the model act provides more guidance than the actual text of the enacted statute. In this case, the language of the relevant statute differs from the corresponding provision of the model act, yet Justice CAVANAGH still holds the belief that " 'the Legislature did not intend any substantial difference in scope or meaning from the prototypical UMVARA concept excepting thieves from no-fault coverage . . . .' " *Post* at 541, quoting *Priesman*, 441 Mich at 67-68. There is a very substantial difference between language that excludes only car thieves from receiving PIP benefits and language that excludes all persons who have unlawfully taken vehicles from receiving PIP benefits.

Some 20 years after *Priesman*, Justice CAVANAGH still seeks to insert into Michigan Law the UMVARA provision that "except[ed] from coverage a 'converter'—a person who steals—unless covered under a no-fault policy issued to the converter or a spouse or other relative in the same household." *Priesman*, 441 Mich at 66 (opinion by LEVIN, J.) (emphasis

than taking the first step of statutory interpretation, i.e., examining the relevant statute, the *Priesman* plurality referred to the UMVARA and compared the UMVARA—which used the term "converter"—to the relevant phrase in MCL 500.3113(a), "taken unlawfully." From this difference, the plurality presumed that "[t]he legislative purpose, in rejecting the UMVARA language, was thus to except from no-fault coverage thieves while driving stolen vehicles even if they or a spouse or relative had purchased no-fault insurance, and not necessarily to except joyriders from coverage."[90] This presumption is entirely unfounded. The only legislative purpose that can be gleaned from the text of MCL 500.3113(a) is the intent to exclude persons who had unlawfully taken vehicles.

We conclude that the family-joyriding exception is not supported by the text of MCL 500.3113(a). Unlike

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omitted). He admits as much by endorsing *Priesman*'s attempt to "g[i]ve meaning" to the statute's language by "consider[ing] the modifications that the Legislature made to the model act that was the starting point for the statute that was eventually enacted." *Post* at 539-540. Contrary to Justice CAVANAGH's assertion, our "true disagreement with *Priesman* is [not] that *Priesman* simply defined the phrase 'taken unlawfully' more narrowly than . . . [we] would like." *Post* at 541-542. Our disagreement is that *Priesman* did not consider the statute as the *starting point*; rather, it first considered the UMVARA, then concluded that the Legislature intended to exclude "only car thieves" from receiving PIP benefits. Of course, the Legislature clearly could have readily excluded "only car thieves" and indeed could have simply adopted the UMVARA language and excluded "converters." Instead, the Legislature decided to except from PIP benefits persons who have "unlawfully taken" the vehicle. Rather than accepting this Legislative decision, Justice CAVANAGH prefers an interpretation in which any person can take and use any other person's vehicle with or without the owner's permission at any time for whatever reason as long as the person merely intends to return the vehicle at some later point in time. This interpretation is not grounded in the text of MCL 500.3113(a) and would, in fact, serve to entice uninsured persons to unlawfully take vehicles for joyrides.

[90] *Priesman*, 441 Mich at 67 (opinion by LEVIN, J.).

the plurality opinion in *Priesman*, our decision is not based on the presumed driving habits of legislators or their families, and we certainly will not speculate whether, "sitting at a drafting session,"[91] a majority of legislators collectively decided that family joyriders are entitled to PIP benefits, regardless of any circumstances surrounding the taking of the vehicle. Rather, we simply refer to the statutory text, which provides that

> [a] *person* is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The *person* was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the *person* reasonably believed that he or she was entitled to take and use the vehicle.[92]

"If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted."[93] There is absolutely no textual basis to support a family-joyriding exception to MCL 500.3113(a).

The plurality decision in *Priesman* demonstrates the ramifications of decisions that stray from the statutory text.[94] The plurality decision strayed by sanctioning a child's unlawful taking of his parent's motor vehicle.

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[91] *Id*. at 68.

[92] MCL 500.3113(a) (emphasis added).

[93] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[94] We disagree with the sweeping proposition in Justice HATHAWAY's dissenting opinion that "the purpose of the no-fault act [is] to provide a source and means of recovery to persons injured in auto accidents." *Post* at 552. What is commonly referred to as "the no-fault act" for the sake of convenience is in fact the no-fault *insurance* act. The purpose of the act can be derived from its express language. Given that the express

Butterworth expanded the joyriding exception to include even an adult family member who did not reside in the home of the insured and who had been expressly prohibited from taking the vehicle. *Mester* and *Allen* reaffirmed the family-joyriding exception, while *Roberts* expanded the exception to encompass someone who was not a family member of the vehicle's title owner, but a family member of someone who had received permission to use the vehicle from the title owner. Therefore, we conclude that Justice LEVIN's plurality opinion in *Priesman* and its progeny—including *Butterworth*,[95] *Mester*,[96] *Allen*,[97] and *Roberts*[98]—did not apply the plain meaning of MCL 500.3113(a).

C. STARE DECISIS AND RETROACTIVITY

Priesman was not a majority opinion of the Court. As a result, the principles of stare decisis do not apply to *Priesman*:

> "The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties."[99]

Thus, Justice LEVIN's plurality opinion *Priesman* only bound the parties before it and does not bind this

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language of MCL 500.3113(a) excludes drivers from receiving benefits under these circumstances, it is the exclusion of benefits that effectuates the purpose of the no-fault act.

[95] *Butterworth*, 225 Mich App 244.

[96] *Mester*, 235 Mich App 84.

[97] *Allen*, 268 Mich App 342.

[98] *Roberts*, 282 Mich App 339.

[99] *People v Sexton*, 458 Mich 43, 65; 580 NW2d 404 (1998), quoting *People v Anderson*, 389 Mich 155, 170; 205 NW2d 461 (1973).

Court's decision. Likewise, *Butterworth*, *Mester*, *Allen*, and *Roberts* are Court of Appeals decisions, and, as such, are not binding precedent in this Court.

" 'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.' "[100] This principle does have an exception: When a

> "statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision."[101]

Spectrum Health and Mary Free Bed claim that this opinion should only apply prospectively. They maintain that insurance companies set their premiums to reflect the family-joyriding exception and that it is the medical providers and insureds who will suffer the consequences of this opinion. Justice CAVANAGH similarly claims there is an expectation that family members who drive a family vehicle without express permission will be covered. However, it is undisputed that there is no contractual right to have insurance companies provide PIP benefits to operators in these cases.[102] Indeed, Ryan DeYoung is a named excluded driver on the policy purchased from Progressive. In other words, our deci-

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[100] *Gentzler v Constantine Village Clerk*, 320 Mich 394, 398; 31 NW2d 668 (1948).

[101] *Id.* (citation and emphasis omitted).

[102] See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003) (holding that the approach to contractual interpretation in which "judges divine the parties' reasonable expectations and then rewrite the contract accordingly" is "contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly

sion today does not at all affect the parties' contractual rights, and it is retrospective in its operation.

IV. CONCLUSION

Our decision today applies the plain language of MCL 500.3113(a), which excludes from receiving PIP benefits someone who "was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle."

Therefore, any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL 750.414, informally known as the "joyriding" statutes—has taken the vehicle unlawfully within the meaning of MCL 500.3113(a).

We overrule *Bronson*'s "chain of permissive use" theory, which incorporated concepts from the owner's liability statute, as inconsistent with MCL 500.3113(a). The owner's liability statute establishes an owner's civil liability for injury caused by the negligent operation of his or her vehicle *whenever* the vehicle was "being driven" with the owner's "express or implied knowledge or consent." Because its focus on the unlawful nature of the taking involves the *driver's* authority to take the vehicle, MCL 500.3113(a) is not analogous to the owner's liability statute.

Because the legality of the taking does not turn on whether the driver intended to steal the car, MCL 500.3113(a) applies equally to joyriders. Moreover, because MCL 500.3113 refers to "*a* person," the Legislature clearly and plainly intended to exclude from receiv-

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unusual circumstance, such as a contract in violation of law or public policy"); see also *Singer v American States Ins*, 245 Mich App 370, 381 n 8, 631 NW2d 34 (2001).

ing PIP benefits even a relative who took a vehicle unlawfully. Therefore, we disavow Justice LEVIN's plurality opinion in *Priesman* and overrule its Court of Appeals progeny as inconsistent with MCL 500.3113(a).

Accordingly, in both *Spectrum Health* (Docket No. 142874) and *Progressive* (Docket No. 143330), we reverse the Court of Appeals' judgments and remand these cases to the respective circuit courts for further proceedings consistent with this opinion.

YOUNG, C.J., and MARKMAN and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to reject the well-established caselaw interpreting the availability of personal protection insurance (PIP) benefits under MCL 500.3113(a). Instead, I would reaffirm the "chain of permissive use" doctrine as well as the interpretation of MCL 500.3113(a) from *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992). Because the Court of Appeals panels in these cases correctly applied these principles, I would affirm the Court of Appeals' judgment in both cases.

Under MCL 500.3113(a), an injured person is barred from recovering PIP benefits if the injured person "was using a motor vehicle or motorcycle which he or she had *taken unlawfully* . . . ." (Emphasis added.) In *Priesman*, the lead opinion held that the insured's teenage son, who drove his mother's vehicle without express permission, had not taken the vehicle unlawfully for purposes of MCL 500.3113(a). *Priesman*'s analysis formally became part of Michigan's caselaw when it was adopted by the Court of Appeals in *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304

(1997). Thus, in accordance with MCR 7.215(J)(1),[1] the Court of Appeals in *Progressive Marathon Ins Co v DeYoung*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 296592), accurately applied *Priesman*'s progeny as binding caselaw to conclude that MCL 500.3113(a) does not prohibit Ryan DeYoung from recovering PIP benefits.

The majority now reverses the Court of Appeals in *Progressive* and discards *Priesman* and its progeny, claiming that *Priesman* erroneously interpreted MCL 500.3113(a). The majority's reading of *Priesman* is flawed, however. To begin with, the majority inaccurately claims that *Priesman* "stray[ed] from" and is thus entirely divorced from the statutory language in MCL 500.3113(a). *Ante* at 534. Rather, like the majority opinion in this case, *Priesman* focused on the requirement that the vehicle be "taken unlawfully" in order to trigger the exclusion under MCL 500.3113(a).

Priesman gave meaning to this phrase by reviewing the Uniform Motor Vehicle Accident Reparations Act (UMVARA). Contrary to the majority's claims, consideration of the UMVARA was an entirely logical approach to determining the legislative intent behind MCL 500.3113(a) because, as the lead opinion in *Priesman* explained, MCL 500.3113(a) was modeled after a provision in the UMVARA. Accordingly, an obvious method for determining the legislative intent behind MCL 500.3113(a) and the plain meaning of the words used was to determine what the Legislature intended to

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[1] MCR 7.215(J)(1) states, in relevant part:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . .

accomplish by modifying the language of the model provision from which MCL 500.3113(a) was ultimately crafted. Thus, the majority is incorrect when it implies that *Priesman* "rel[ied] on [a] model act[] . . . rather than the clear language of [the] actual statute at issue." *Ante* at 530. Rather, to define the critical phrase used in the statute[], *Priesman* merely considered the modifications that the Legislature made to the model act that was the starting point for the statute that was eventually enacted. Notably, *Priesman* did not break new ground in considering the UMVARA; indeed, this Court has previously considered the UMVARA as a source of guidance in construing provisions of the no-fault act. See, e.g., *MacDonald v State Farm Mut Ins Co*, 419 Mich 146; 350 NW2d 233 (1984), and *Thornton v Allstate Ins Co*, 425 Mich 643, 391 NW2d 320 (1986); see, also, *Donajkowski v Alpena Power Co*, 460 Mich 243, 257 n 14; 596 NW2d 574 (1999) (finding the fact that the Legislature deviated from a model act "significant to any good-faith effort to give meaning to the Legislature's intent").[2]

Priesman specifically focused on the fact that the UMVARA "except[ed] from coverage a 'converter'—a person who steals—*unless* covered under a no-fault policy issued to the converter or a spouse or other relative in the same household." *Priesman*, 441 Mich at 66. *Priesman* concluded that

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[2] In citing these cases, I do not argue that *Priesman*'s consideration of the UMVARA is identical to this Court's consideration of the UMVARA in *MacDonald*, *Thornton*, or any other case for that matter. Rather, I merely note that, contrary to the majority's apparent belief that model acts are not worthy of *any* consideration regardless of the role that the model act may have played in the legislative process, this Court has previously concluded that, under certain circumstances, model acts are a valid tool in determining the Legislature's intent. I believe that *Priesman* aptly explained why it was proper to use the UMVARA as a tool to interpret MCL 500.3113(a).

> [t]he legislative purpose, in rejecting the UMVARA language, was thus to except from no-fault coverage *thieves while driving stolen vehicles* even if they or a spouse or relative had purchased no-fault insurance, and not necessarily to except joyriders from coverage. At the same time, the Legislature simplified the complex verbiage of the no-fault exception, and thereby avoided litigation concerning what constitutes "conversion," a term of art in criminal and personal property law. [*Id.* at 67 (emphasis added).]

Accordingly, *Priesman* definitively concluded that the phrase "taken unlawfully" included car thieves but not those who simply drive a vehicle without express permission and without the intent to steal the vehicle. *Priesman* also concluded that "in substituting 'taken unlawfully' for 'converts,' the Legislature did not intend any substantial difference in scope or meaning from the prototypical UMVARA concept excepting thieves from no-fault coverage . . . ." *Id.* at 67-68.[3]

In summary, *Priesman* closely considered the critical phrase within MCL 500.3113(a)—"taken unlawfully"—and merely acted to define that phrase, which the majority admits is not defined in the statute. Moreover, *Priesman* considered a logical source for that definition, given the legislative process that created MCL 500.3113(a). Accordingly, it appears that the majority's true disagreement with *Priesman* is that *Priesman* simply defined the phrase "taken unlawfully" more narrowly than the major-

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[3] In support of this conclusion, *Priesman* cited Keeton & Widiss's treatise on insurance law, which explained that

> "[e]xclusions from PIP coverage apply to the owner of a vehicle who does not purchase the mandatory coverage and who is injured in his own vehicle; a person injured in an automobile that *he has stolen;* and a non-resident who does not have coverage that has been certified by his insurer." [*Priesman*, 441 Mich at 68 n 15, citing Keeton & Widiss, Insurance Law, § 410, p 422.]

ity would like. This is not a sufficient justification for the majority's decision to supplant more than 15 years of this state's jurisprudence.

The majority also argues that it is proper to consider the Michigan Penal Code, MCL 750.1 *et seq.*, to give meaning to the phrase "taken unlawfully." Ironically, this approach runs afoul of the majority's conclusion that *Priesman* erred because it considered sources other than the statutory text at issue. Other than the majority's strained exaggeration of its carefully selected dictionary definitions, there is no indication that it is proper to resort to the Penal Code to give meaning to a specific phrase in the no-fault act. It is axiomatic, however, that "[w]hen considering the correct interpretation, the statute must be read as a whole" and that "[i]ndividual words and phrases, while important, should be read in the context of the *entire legislative scheme*." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (emphasis added, citations omitted). Accordingly, while the majority is apparently compelled by a dictionary to look outside the no-fault act, I am compelled by the canons of statutory interpretation to conclude that *Priesman* wisely recognized that MCL 500.3113(a) must be considered within the full context of the no-fault act and that *Priesman*, therefore, correctly concluded that the Legislature's intent to provide broad accessibility to benefits informed the proper interpretation of MCL 500.3113(a). *Priesman*, 441 Mich at 64-66.[4]

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[4] Although the majority is correct that taking a car with the intent to steal is a violation of the Penal Code, the majority unsuccessfully attempts a leap in logic to conclude that the phrase "taken unlawfully" *must* refer to the Penal Code. In my view, *Priesman* persuasively explains that when the phrase "taken unlawfully" in MCL 500.3113(a) is considered in the context of the entire no-fault act as the rules of statutory interpretation require, the Legislature did not intend the broad meaning

The majority ignores the legislative intent to provide broad accessibility to benefits by conflating the concept of providing PIP benefits to a person who made a poor decision with that of endorsing that person's conduct. See *ante* at 533 n 89 (implying that *Priesman* condones or encourages a person's decision to joyride). *Priesman* no more condoned or encouraged this conduct than the no-fault act condones or encourages any other irresponsible conduct that results in an automobile accident. Nevertheless, a person who causes an accident by texting, fiddling with the radio, or simply daydreaming while driving is generally entitled to PIP benefits. Accordingly, if the majority truly believes that *Priesman* would "serve to entice" joyriders, *ante* at 533 n 89, the majority must also believe that the no-fault act entices other types of irresponsible conduct that is likely to cause automobile accidents. Moreover, I seriously doubt that the average would-be joyrider pauses to consider the availability of PIP coverage when deciding to go for a spin in another person's car.

The majority also relies heavily on the Court of Appeals' opinions in *Butterworth*, 225 Mich App 244, and *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999), to support its mischaracterization and dismissal of *Priesman*'s analysis. Although those opinions reached the right result under *Priesman*'s analysis, they also improperly interpreted *Priesman*. Specifically, *Butterworth* stated that MCL 500.3113(a) "does not apply to cases where the person *taking the vehicle unlawfully* is a family member doing so without the intent to steal but, instead, doing so for joyriding purposes." *Butterworth*, 225 Mich App at 249

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that the majority imparts on the phrase "taken unlawfully." Accordingly, the majority is obviously mistaken in concluding that I "tacitly admit[]" that the phrase "taken unlawfully" in MCL 500.3113(a) "can only refer to the Michigan Penal Code." *Ante* at 517 n 22.

(emphasis added). Similarly, *Mester* stated that "the justices of the Supreme Court who recognized a joyriding exception in the *Priesman* case did so *not because joyriding does not involve an unlawful taking*, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member." *Mester*, 235 Mich App at 88 (emphasis added). Indeed, nowhere in the *Priesman* plurality opinion did Justice LEVIN use the phrase "family joyriding exception," and *Butterworth* coined the phrase " 'family member' joyriding exception" by citing Justice GRIFFIN's *Priesman* dissent rather than Justice LEVIN's lead opinion. *Butterworth*, 225 Mich App at 248.

These statements in *Butterworth* and *Mester* are erroneous because *Priesman* accurately interpreted the phrase "taken unlawfully" as including *only car thieves*. Accordingly, *Butterworth* and *Mester* incorrectly concluded that *Priesman* "exempts" a person who "takes the vehicle unlawfully." Instead, *Priesman* held that a vehicle that was driven without express permission does not meet the definition of one that was "taken unlawfully" under MCL 500.3113(a). Moreover, the majority in *Butterworth* rejected Judge HOEKSTRA's concurring opinion, in which he argued that a person's familial relationship to the owner of a car is irrelevant when applying *Priesman*. Judge HOEKSTRA concluded that nothing in *Priesman* supported the *Butterworth* majority's conclusion; rather, Judge HOEKSTRA determined that *Priesman* stood for the proposition that "the legislators intended to except from [PIP] benefits only persons injured while driving a car they intended to *steal* . . . ." *Butterworth*, 225 Mich App at 253 (HOEKSTRA, J., concurring).

Judge HOEKSTRA was correct in his interpretation of *Priesman*'s holding. Specifically, *Priesman* expressly

stated that "[t]he legislative purpose . . . was thus to except from no-fault coverage *thieves while driving stolen vehicles* . . . ." *Priesman*, 441 Mich at 67 (emphasis added). Accordingly, Judge HOEKSTRA accurately concluded that *Priesman*'s discussion of the family relationship at issue in that case "was merely part of the factual basis of the case and did not establish a limiting parameter for interpreting the Court's remaining discussion." *Butterworth*, 225 Mich App at 253 (HOEKSTRA, J., concurring). Thus, I would reject *Butterworth* and *Mester* to the extent that those opinions are inconsistent with the proper interpretation of *Priesman*. Additionally, I would clarify this area of law by eliminating the misleading label "family joyriding *exception*." There is no "exception"; rather, *Priesman* simply applied the rules of statutory interpretation to give meaning to the phrase "taken unlawfully" as it is used in MCL 500.3113(a).

Finally, although the principles of stare decisis do not apply to *Priesman* because it is a plurality opinion, it should not go unnoticed that the Court of Appeals adopted *Priesman*'s holding and those Court of Appeals opinions have been binding law for the last 15 years.[5] Accordingly, as applied by the Court of Appeals, the rule has created an expectation that, at a minimum, a family member who drives a family vehicle without express permission would be covered for PIP benefits. Furthermore, insureds have paid their insurance premiums for the last 15 years with this expectation.[6] The majority

[5] It is also noteworthy that the Legislature has not chosen to modify MCL 500.3113(a) in response to *Priesman* and its progeny. If the majority is correct that *Priesman* was a grossly inaccurate interpretation of the Legislature's intent that has caused untold harm, it would seem that the Legislature would have acted to vindicate its true intent.

[6] It is important to note that although Ryan DeYoung was an excluded driver under the policy at issue in *Progressive*, that exclusion only applied

may not agree with *Priesman*; however, *Priesman* is nevertheless a reasonable interpretation of the statutory language, and the Court of Appeals caselaw adopting and applying the rule is *binding law*. MCR 7.215(J)(1). Accordingly, insurers and insureds alike have rightfully conformed their conduct in reliance on *Priesman*'s progeny. Thus, I believe that although *Priesman* and its progeny are not entitled to stare decisis consideration, the reliance interests related to this area of the law are significant, worthy of some consideration, and strongly counsel against departing from the existing state of the law.[7]

Accordingly, I see no reason to reject *Priesman*. I would instead affirm the judgment of the Court of Appeals in *Progressive* and uphold *Priesman*'s interpre-

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to tort coverage. Pursuant to the language in the policy itself, Ryan was not excluded from recovering PIP benefits. Thus, despite the majority's attempt to inject this issue in support of its holding, the Court of Appeals correctly concluded that the excluded-driver provision is irrelevant. Only the caselaw interpreting the meaning of "taken unlawfully" in MCL 500.3113(a) governs whether Ryan is entitled to PIP benefits, which, under *Priesman*'s progeny, the Court of Appeals in *Progressive* correctly concluded that he is.

[7] The correction of the Court of Appeals' misinterpretation of *Priesman* that I propose would not have the same negative effect that the majority opinion will have on the reliance interests at issue because insureds would not be denied coverage that was previously provided. Stated differently, despite their erroneous interpretation of *Priesman*, the previous Court of Appeals opinions nevertheless reached the right result.

Furthermore, the majority misinterprets my discussion of the reliance interests related to *Priesman* and its progeny to the extent that the majority reads my analysis to argue that the majority decision in this case should have prospective effect only. Rather, I discuss the reliance interests at issue to further explain why I disagree with the majority's decision to discard 15 years of binding caselaw. Specifically, not only do I believe that *Priesman* is a proper interpretation of the statute, but because insureds and insurers have relied on that interpretation and conformed their conduct accordingly, I believe any disturbance of those reliance interests is unwarranted.

tation of MCL 500.3113(a). Additionally, I agree with Justice HATHAWAY's conclusion that the Court of Appeals in *Spectrum Health* did not clearly err by holding that Craig Smith, Jr., did not unlawfully take the vehicle. Thus, I would also affirm the judgment of the Court of Appeals in *Spectrum Health*.

MARILYN KELLY, concurred with CAVANAGH, J.

HATHAWAY, J., concurred with CAVANAGH, J., with respect to *Progressive* only.

HATHAWAY, J. (*dissenting*). I fully join Justice CAVANAGH's dissenting opinion with respect to today's decision in *Progressive Marathon Insurance Company v DeYoung*. I write separately to address the majority's decision in *Spectrum Health Hospitals v Farm Bureau Mutual Insurance Company of Michigan*, in which the majority rejects and discards the "chain of permissive use" theory. I am not persuaded that this theory should be discarded. It is a well-reasoned and well-established doctrine that has been part of this state's jurisprudence for decades.

At issue in *Spectrum Health* is the proper interpretation of MCL 500.3113, which provides in pertinent part:

> A person is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

As the language of the statute provides, MCL 500.3113(a) generally precludes an injured person from recovering personal protection insurance (PIP) benefits under a policy associated with a vehicle if that person

had taken the vehicle unlawfully. The question before us in *Spectrum* involves determining whether the PIP claimant's taking of the vehicle in question was unlawful under this provision.

Because the no-fault act does not define "taken unlawfully," courts have looked beyond the words of the statute to effectuate the intent of the Legislature. In giving this phrase meaning, our courts have developed the doctrine known as the chain-of-permissive-use theory. I would affirm the Court of Appeals' judgment in *Spectrum Health*[1] because the Court of Appeals properly applied this theory to the facts before it.

The chain-of-permissive-use theory was first recognized in *Bronson Methodist Hospital v Forshee*.[2] In *Bronson*, the Court of Appeals held that a person had not unlawfully taken the car in which he was later injured even though he had not been given permission by the owner to use the car. The vehicle owner's son, Thomas Pefley, was arrested while driving with friends in his family's car. Given that he was under arrest, he asked one of his friends, William Morrow, to take the car home. Later that night, Morrow let another friend, Mark Forshee, drive the car. Forshee was intoxicated and eventually crashed the car after being chased by police. The primary issue in the case was whether Forshee had unlawfully taken the car and was therefore excluded from recovering PIP benefits under MCL 500.3113(a).

The unanimous panel in *Bronson* noted that there was no caselaw that specifically defined "taken unlaw-

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[1] *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2011 (Docket No. 296976).

[2] *Bronson Methodist Hosp v Forshee*, 198 Mich App 617; 499 NW2d 423 (1993).

fully" as that phrase is used in the no-fault act.[3] Accordingly, the *Bronson* panel turned to a similar area of law involving a vehicle owner's liability. Specifically, the panel considered this Court's decision in *Cowan v Strecker*,[4] which involved the taking of a vehicle with the consent of an intermediate user but without the express consent of the owner. While *Cowan* did not involve the no-fault act, it involved a similar statute, MCL 257.401, commonly known as the owner's liability statute.

In *Cowan*, the owner of the vehicle loaned it to an acquaintance with the express direction to not let anyone else use it. Nevertheless, the acquaintance let her son use the car, and he was involved in an accident. This Court determined that the owner of the vehicle was liable under the owner's liability statute, based on a broad understanding of consent. The Court reasoned that given the owner's willing surrender of the vehicle to the acquaintance, the owner had consented to the risks inherent in surrendering control of a vehicle to another, "regardless of admonitions which would purport to delimit his consent."[5] Thus, this Court held that an owner's consent to an intermediate user included the consent to any subsequent users of the vehicle, even when the owner set restrictions on the use by the intermediate user.

The Court of Appeals in *Bronson* found this Court's interpretation of the owner's liability statute persuasive and applied the same analysis and reasoning to the unlawful-taking provision contained within the no-fault act. As such, *Bronson* held that when an owner of a vehicle gives permission to an intermediate user to take the vehicle, the intermediate user then has the authority to give permission to a subsequent user to take that

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[3] *Id*. at 623.

[4] *Cowan v Strecker*, 394 Mich 110; 229 NW2d 302 (1975).

[5] *Id*. at 115.

vehicle. Therefore, the subsequent user in *Bronson* had lawfully taken the vehicle with the consent of the owner under the no-fault act.[6]

In *Spectrum Health*, the Court of Appeals correctly applied the chain-of-permissive-use theory to the facts before it. Plaintiff, Spectrum Health Hospitals, seeks to recover the cost of care that it provided to Craig Smith Jr. from the insurer of a truck owned by Craig Smith Jr.'s father, Craig Smith Sr. Craig Sr.'s truck was insured by defendants Farm Bureau Mutual Insurance Company of Michigan and Farm Bureau General Insurance Company of Michigan (collectively "Farm Bureau"). Farm Bureau claims that Craig Jr. is excluded from coverage under MCL 500.3113(a) because he had taken his father's truck unlawfully. Craig Sr. had loaned the truck to Craig Jr.'s girlfriend with instructions not to let Craig Jr. drive it. However, Craig Jr.'s girlfriend did allow him to drive it, and he was involved in an accident. Spectrum Health treated Craig Jr. and brought the instant suit to recover PIP benefits associated with his care. Both the trial court and the Court of Appeals held that Craig Jr. was not excluded from coverage under the chain-of-permissive-use theory because Craig Sr. had turned control of the truck over to Craig Jr.'s girlfriend, and she in turn gave Craig Jr. permission to use the truck. The majority's decision overrules the Court of Appeals and discards the well-established chain-of-permissive-use theory.

I disagree with the majority because the Court of Appeals correctly applied *Bronson* and the chain-of-permissive-use theory based on *Cowan*. I find that the *Bronson* analysis was a well-reasoned interpretation of the phrase "taken unlawfully" in its context within MCL 500.3113(a). It is reasonable to assume that the Legislature intended "taken unlawfully" to be applied

[6] *Bronson*, 198 Mich App at 625.

in terms of consent of the owner, and this Court in *Cowan* properly defined what the consent of an owner includes. The majority's opinion simply substitutes its own definition of "taken unlawfully" for the well-established definition set forth in *Bronson*. However, the definition in *Bronson* was consistent with the policy of this state under the no-fault act that " 'persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery.' "[7] Unfortunately, the majority's new definition strays from this policy when there is no compelling reason to do so.

The majority criticizes *Bronson* for looking outside the text of the no-fault act in order to determine the meaning of "taken unlawfully." The majority expresses concern that *Bronson* relied on the meaning of an owner's "consent," a term found only in one unrelated provision of the no-fault act. See MCL 500.3116(3). However, the majority uses the same approach in reaching its definition of "taken unlawfully." Specifically, the majority looks outside the text of MCL 500.3113(a) and relies on the word "authority," which is also found only in one unrelated provision of the no-fault act. See MCL 500.3104(1). In its search for the meaning of "taken unlawfully," the majority looks to the dictionary for the definitions of "unlawful" and "take." From the dictionary definitions, the majority concludes that "taken unlawfully" refers to a criminal act. Then, just as the panel did in *Bronson*, the majority seeks guidance from a statute governing another area of law, and it turns to MCL 750.414, a statute that places criminal liability on a person who "takes or uses without authority any motor vehicle without intent to steal the same . . . ."

[7] *Coburn v Fox*, 425 Mich 300, 311 n 3; 389 NW2d 424 (1986) (citation omitted).

The majority focuses on the word "authority" in the criminal statute despite the fact that "authority" is not found in the relevant provision of the no-fault act. It then concludes that if a person takes a vehicle against the express wishes of the owner, he or she has taken the vehicle without the owner's "authority" and has done so unlawfully under the no-fault act. Thus, like *Bronson*'s reliance on "consent" from the owner's liability statute, the majority relies on an owner's "authority" under another area of law. Given that the majority engages in the same "outside the text of the statute" analysis, its criticisms of *Bronson* fall flat.

I disagree with the majority's interpretation of "taken unlawfully." Its interpretation precludes a class of injured parties from recovering PIP benefits even when a party was given permission to take a car by an intermediate user. The *Bronson* interpretation is the better interpretation because it was more consistent with the purpose of the no-fault act to provide a source and means of recovery to persons injured in auto accidents. The majority's interpretation conflicts with that purpose. Moreover, the idea that the consent of an owner can be passed down through a chain of permissive users is well established in the law, and I see no reason to depart from it.

Accordingly, I respectfully dissent. I would affirm the judgment of the Court of Appeals in *Spectrum Health* because it correctly applied the well-reasoned and well-established chain-of-permissive-use theory.

MARILYN KELLY, J., concurred with HATHAWAY, J.

In re JAMES

Docket No. 143942. Argued July 18, 2012 (Calendar No. 1). Decided July 31, 2012.

The Judicial Tenure Commission (JTC) filed a formal complaint against Judge Sylvia A. James of the 22d District Court, alleging four counts of misconduct. The complaint asserted that respondent had engaged in financial improprieties, administrative improprieties, and employment improprieties and made misrepresentations to the JTC. The Supreme Court appointed retired District Court Judge Ann E. Mattson to act as master and suspended respondent from office with pay until further order. 490 Mich 936 (2011). After a formal hearing, Judge Mattson concluded that the examiner had proved portions of all four counts by a preponderance of the evidence and that respondent had committed misconduct in office as defined in Const 1963, art 6, § 30 and MCR 9.205(B)(1) and violated MCR 9.104(1) and (2); MCR 9.205(A); Canons 1, 2(A) through (C), 3(A)(1) and (2), 3(B)(1), and 6(B) of the Code of Judicial Conduct; MCL 600.4803; MCL 600.8379; MCL 600.8501; MCL 600.8507; MCL 750.174; MCL 750.175; MCL 750.218; MCL 750.249; and Administrative Order No. 1996-11. The JTC adopted all but one of the master's findings and recommended that respondent be removed from office and ordered to pay $81,181.88 in costs, fees, and expenses.

In an opinion by Justice MARILYN KELLY, joined by Chief Justice YOUNG and Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

The cumulative effect of respondent's misconduct, coupled with its duration, nature, and pervasiveness, warranted her removal from office.

1. Respondent misappropriated public funds, some of which were intended for victims of crime in the city of Inkster. The most significant of her inappropriate financial transactions and practices involved misappropriation and abuse of Community Service Program (CSP) funds. MCL 775.22 and MCL 780.826a require the allocation of the first 50 percent of certain CSP payments to restitution for crime victims. Respondent instead ordered allocation to the court's CSP account, which did not use the first 50

percent for crime victim payments, and expended these and other monies for uses having no relation to the CSP, including advertisements, travel, and allocations to charities of respondent's choosing. Respondent also inappropriately authorized stipend payments to CSP codirectors who were salaried court employees and performed some of their tasks during the court's business hours. Respondent also failed to establish a CSP budget.

2. Respondent instituted a dress policy that, as enforced, prejudiced litigants and inappropriately denied some litigants and visitors access to the courthouse. Respondent failed to take steps to prevent the improper enforcement.

3. Respondent rehired an unqualified magistrate in violation of MCL 600.8501 and MCL 600.8507, misrepresented that he was qualified, and required him to sign bench warrants in violation of MCL 600.8511. Respondent further violated the Supreme Court's antinepotism policy.

4. Respondent made misrepresentations during the investigation and the hearing, including lying under oath, related to these allegations.

5. Respondent's misconduct convinced the Court that she is unfit for judicial office and warranted her removal from office.

Removal from office ordered; the JTC ordered to submit a bill of costs showing the costs, fees, and expenses incurred in prosecuting the complaint, which may also specify the amount that respondent should have allotted to crime-victims restitution.

Justices CAVANAGH and HATHAWAY concurred in the result of removal from office and directing the JTC to submit an itemized bill of costs pursuant to MCR 9.205(B).

Justice MARKMAN, joined by Chief Justice YOUNG, concurring in part and dissenting in part, agreed that respondent's misconduct compelled her removal from office and payment of costs, but would also have conditionally suspended respondent for six years, one full term of the court over which she presided. The Michigan Constitution confers on the Supreme Court the duty of exercising superintending control over the lower courts to protect the integrity of the justice system, and the elective nature of judicial office does not relieve the Supreme Court of that duty. Conditional suspensions have been imposed when other sanctions could not have fully and adequately addressed the effect of particular misconduct. In this case, the sanctions of removal and costs did not sufficiently address the continuing harm that respondent's sustained pattern of misconduct and disregard for the law inflicted on the integrity of the judiciary in Michigan and on the victims of

> crime within the city of Inkster, who were among the intended beneficiaries of the misappropriated funds. Nor did the sanctions adequately address the likelihood that the harm will continue, given that without an order of conditional suspension respondent would be allowed to almost immediately resume her judgeship if she succeeds in the 2012 primary and the general election following.

Paul J. Fischer and *Margaret Rynier* for the Judicial Tenure Commission.

Morganroth & Morganroth, PLLC (by *Mayer Morganroth* and *Jason R. Hirsch*), *Key Group Legal and Consulting Services PC* (by *Sharon McPhail*), and *Elliott S. Hall* for respondent.

MARILYN KELLY, J. The Judicial Tenure Commission (JTC) has recommended that this Court remove 22d District Court Judge Sylvia A. James from office for judicial misconduct. Judge James (respondent) has filed a petition asking this Court to reject that recommendation. We affirm the JTC's findings and its recommendation and conclude that it is necessary and appropriate to remove Judge James from office for the remainder of her term.

The evidence establishes that respondent misappropriated public funds, some of which were intended for victims of crime in the city of Inkster. She inappropriately spent much of this money on self-promoting advertisements and travel expenses for herself and various other court employees. She treated these funds, as the master phrased it, as her own "publicly funded private foundation." In addition, she (1) denied people access to the court by instituting and enforcing an improper business-attire policy, (2) employed a family member in violation of

court policy, and (3) made numerous misrepresentations of fact under oath during the investigation and hearing of this matter.

The cumulative effect of respondent's misconduct, coupled with its duration, nature, and pervasiveness, convinces this Court that she is unfit for judicial office. Although some of her misconduct, considered in isolation, does not justify such a severe sanction, taken as a whole her misconduct rises to a level that requires her removal from office. Therefore, we adopt the recommendations of the JTC, except with respect to the costs respondent will be ordered to pay, as will be detailed later.

I. FACTS AND PROCEDURAL HISTORY

Respondent is the sole judge in the 22d District Court in Inkster, Michigan. She is bound by the standards for discipline set forth in MCR 9.104 and MCR 9.205[1] and is subject to the duties and responsibilities imposed on her by this Court.

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[1] MCR 9.104, entitled in part "Grounds for Discipline in General," states in relevant part:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> (1) conduct prejudicial to the proper administration of justice;
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
>
> (3) conduct that is contrary to justice, ethics, honesty, or good morals;
>
> (4) conduct that violates the standards or rules of professional conduct adopted by the Supreme Court;
>
> (5) conduct that violates a criminal law of a state or of the United States, an ordinance, or tribal law pursuant to MCR 2.615;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and MCR 9.115(D);

(8) contempt of the board or a hearing panel[.]

MCR 9.205, entitled "Standards of Judicial Conduct," states:

(A) Responsibility of Judge. A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides.

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay . . . or removal for . . . misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(1) Misconduct in office includes, but is not limited to:

* * *

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(f) failure to cooperate with a reasonable request made by the commission in its investigation of a judge.

(2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, whether the conduct occurred before or after the respondent became a judge or was related to judicial office.

(3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.

On October 26, 2011, the JTC filed Formal Complaint No. 88 against respondent, alleging four counts of misconduct.[2] It asserted that respondent had engaged in (1) financial improprieties, (2) administrative improprieties, (3) employment improprieties, and (4) misrepresentations to the JTC. On that same date, it also filed a petition for interim suspension and a request for appointment of a master. On December 15, 2011, this Court appointed retired District Court Judge Ann Mattson as the master and ordered respondent suspended from office with pay until further order of the Court.[3] She has been on suspension ever since.

A formal master's hearing began on January 23, 2012, and concluded on March 1, 2012. On April 23, 2012, the master filed her findings of fact and conclusions of law with the JTC. She concluded that the examiner had proven portions of all four counts by a preponderance of the evidence.[4] In summary, the master stated that "[r]espondent failed to diligently discharge her administrative responsibilities . . . [and] [h]er actions demonstrated her lack of respect for the law." Respondent was found to have committed misconduct in office as defined in Const 1963, art 6, § 30 and MCR 9.205(B)(1), and to have violated MCR 9.104(1) and (2); MCR 9.205(A); Code of Judicial Conduct, Canons 1, 2(A) through (C), 3(A)(1) and (2), 3(B)(1), and 6(B); MCL 600.4803; MCL 600.8379; MCL 750.174;

[2] An amended formal complaint was filed on March 1, 2012.

[3] *In re James*, 490 Mich 936 (2011).

[4] The examiner must present the evidence in support of the charges set forth in the complaint and at all times has the burden of proving the allegations by a preponderance of the evidence. MCR 9.211(A); see also *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998).

MCL 750.175; MCL 750.218; MCL 600.8501; MCL 600.8507; MCL 750.249; and Administrative Order No. 1996-11.

The JTC issued its decision and recommendations for discipline on June 11, 2012. It adopted all but one[5] of the master's findings, concluding that "[r]espondent's prolonged and repeated pattern of misconduct in purposefully violating statutes, misappropriating public funds, and making intentional misrepresentations both before and after these proceedings commenced render her unfit to sit as a judge."

In determining the sanctions appropriate for respondent, the JTC considered the seven factors that the Court set forth in *In re Brown*.[6] It concluded that four of the seven weighed in favor of severe sanctions. It recommended that respondent be removed from office and that she pay $81,181.88 for costs, fees, and expenses incurred as a result of this investigation.

II. ANALYSIS

The Michigan Constitution grants this Court general superintending control over all the state courts in Michigan.[7] It authorizes this Court to "censure, suspend . . . or remove a judge for . . . misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice" upon recommendation of the JTC.[8] The Court may accept or reject the recommenda-

[5] The JTC did not adopt a finding by the master that respondent had misrepresented whether any food purchased with Community Service Program funds had ever been taken to her home.

[6] *In re Brown*, 461 Mich 1291 (2000).

[7] Const 1963, art 6, § 4.

[8] Const 1963, art 6, § 30(2).

tions of the JTC or modify them by imposing greater, lesser, or entirely different sanctions.[9]

We review the recommendations of the JTC de novo.[10] We also review de novo the JTC's findings of fact.[11]

After reviewing the record and hearing oral arguments by the parties, the Court agrees with the findings of the JTC and adopts its recommendation regarding sanctions.

A. FINANCIAL IMPROPRIETIES

The master and the JTC both found that respondent had engaged in inappropriate financial transactions and practices. We agree. The most significant misconduct involved respondent's misappropriation and abuse of Community Service Program (CSP) funds.[12] These funds were collected from members of the public and were indisputably subject to MCL 775.22 and MCL 780.826a,[13] which govern how they should be allotted. The statutes require that the first 50 percent of certain

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[9] MCR 9.225.

[10] *Ferrara*, 458 Mich at 358-359.

[11] *In re Jenkins*, 437 Mich 15, 18; 465 NW2d 317 (1991).

[12] Respondent established the CSP to make available sentencing alternatives for nonviolent defendants. This type of program can be found at various courts in the state. Defendants were sentenced to the CSP as an alternative to, or sometimes in addition to, incarceration. They were charged $10 to $25 a day in oversight fees and were required to perform various community-service tasks within the city of Inkster, such as mowing lawns for the elderly and maintaining the court grounds. Some of the fees were allocated to the CSP.

[13] MCL 775.22 states in relevant part:

> (1) If a person is subject to any combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding, money collected from that person for the payment of fines, costs,

> restitution, assessments, probation or parole supervision fees, or other payments shall be allocated as provided in this section.
>
> (2) Except as otherwise provided in this subsection, if a person is subject to payment of victim payments and any combination of other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of all money collected from that person shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments. If any fines, costs, supervision fees, or other assessments or payments remain unpaid after all of the victim payments have been paid, any additional money collected shall be applied to payment of those fines, costs, supervision fees, or other assessments or payments. If any victim payments remain unpaid after all of the fines, costs, supervision fees, or other assessments or payments have been paid, any additional money collected shall be applied toward payment of those victim payments.

The master and the JTC cited MCL 780.766a, the allocation provision in article 1 of the Crime Victim's Rights Act, MCL 780.751 *et seq*., applicable to felonies. It is clear that the intended reference was to MCL 780.826a, which is found in article 3 of that act, MCL 780.811 *et seq*. This is the article applicable to misdemeanors, over which respondent presided. We note, however, that the two provisions are virtually identical and that the presumably inadvertent citation error does not affect our analysis or the result.

MCL 780.826a states in relevant part:

> (1) If a person is subject to any combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments arising out of the same criminal proceeding, money collected from that person for the payment of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments ordered to be paid in that proceeding shall be allocated as provided in this section. If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in this section.
>
> (2) Except as otherwise provided in this subsection, if a person is subject to payment of victim payments and any combination of

CSP-fund payments be allocated to crime victims in restitution for their financial losses as a result of criminal acts.

The court's judicial information system (JIS) is programmed to automatically apply these payments in compliance with the statutes. Notwithstanding that fact, respondent ordered her clerks to override the JIS to allocate them first to the court's CSP account, which did not use the first 50 percent for crime-victim restitution.[14]

Respondent expended monies intended for crime-victim restitution and for additional legislatively man-

other fines, costs, assessments, probation or parole supervision fees, or other payments, 50% of each payment collected by the court from that person shall be applied to payment of victim payments, and the balance shall be applied to payment of fines, costs, supervision fees, and other assessments or payments. If a person making a payment indicates that the payment is to be applied to victim payments, or if the payment is received as a result of a wage assignment under [MCL 780.826] or from the sheriff under [MCL 780.830a], the payment shall first be applied to victim payments. If any fines, costs, supervision fees, or other assessments or payments remain unpaid after all of the victim payments have been paid, any additional money collected shall be applied to payment of those fines, costs, supervision fees, or other assessments or payments. If any victim payments remain unpaid after all of the fines, costs, supervision fees, or other assessments or payments have been paid, any additional money collected shall be applied to payment of those victim payments.

[14] The master compared deposits in the court's CSP account before respondent's suspension with deposits made after respondent had been suspended. At that point, the interim judge who replaced respondent had directed the clerks to stop overriding the JIS system. For example during the month of August 2010, under respondent's administration, $7,366 was credited to the CSP account. During the month of August 2011, under the interim judge, only $433 was deposited into the CSP account. Respondent argued that the difference is because there were fewer participants in the program under the interim judge. The evidence established that this was not true. The interim judge testified that the program was fully operational in August 2011. The court's probation officer also supported this statement.

dated priorities to other sources in a manner that she alone controlled. She expended thousands of dollars on items having no relation to the operation of the CSP. She chose the charities and organizations that would receive the funds and personally signed each of the checks. Many of these expenditures were for advertisements that promoted the judge, prominently displaying her picture and only tangentially mentioning the CSP. She also allocated CSP funds to local charities of her choice[15] and spent them on travel[16] and other expenses as she deemed fit.[17]

The facts also show that respondent authorized payments to three CSP codirectors of stipends in the amount of $650 a month. These individuals were paid as independent contractors, despite the fact that they were already salaried employees of respondent's court.

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[15] Respondent authorized the distribution of more than $14,000 from the CSP account to local charitable, fraternal, and religious organizations from 2008 until her suspension in 2011. These expenditures included donations for a "table for ten at a testimonial event," a local basketball camp, a police auxiliary annual picnic, cheerleader uniforms, and a school "Europe fund." None was a proper operational expenditure of the CSP. Proper expenditures were only those that paid for the operation of the program, such as flowers to be planted or lawn mowers to maintain the lawns of needy Inkster senior citizens.

[16] Respondent also used the account to fund her own and other employees' travel expenses totaling $13,000, including travel to drug court conferences in California and Massachusetts. Respondent repeatedly estimated expenses for herself and other employees and wrote checks for the estimated expenses from the CSP account. None of the recipients was required to track or document his or her spending or reimburse the court for expense payments not used for court-related business. This practice violated Code of Judicial Conduct, Canon 6(B). Drug court conferences were not proper operational expenses of the CSP. It is also worth noting that Inkster has never established a drug court.

[17] Additional expenses included gifts for board members of the Tax Increment Finance Authority, embroidered shirts bearing respondent's name, a court newsletter, funeral flowers, and expenses related to Law Day. None of these was a proper operational expenditure of the CSP.

Between late 2008 and early 2011, one of these individuals received more than $8000, the second more than $21,000, and the third more than $19,000 paid from CSP funds. Respondent required all three to submit monthly statements of tasks performed but did not require them to document how many hours they worked. Some of their CSP tasks were performed during regular court business hours. The individuals spent between 15 and 20 hours a week on CSP tasks and were paid each month, in advance, regardless of whether they submitted monthly reports. Also, they were paid without regard to the number of hours worked. In some instances, they were paid two or even three months in advance.

Respondent also failed to establish a budget for the CSP account, as mandated by MCL 600.8271. She claimed that she was "not put on notice" that she was required to create a budget. However, an October 2007 audit report, which respondent admitted she had read, apprised respondent that state law required a budget for all general and special revenue accounts, including the CSP.[18] Thus, although she had been warned that she was disobeying state law, respondent continued to refuse to establish a budget for the CSP account four years later.

B. ADMINISTRATIVE IMPROPRIETIES

The master and the JTC found that respondent implemented an unreasonable business-attire policy

[18] The "control deficiency" section of this audit report stated: "No budget was prepared for the Community Service Fund which is a special revenue fund. According to the state budget act, a budget is required for all general and special revenue funds. A budget should be prepared and approved prior to July 1 of each fiscal year."

and allowed it to be enforced at the court, resulting in people being denied access to the court. The Court agrees with this finding.

The respondent instituted the business-attire policy because some people wore clothing in court that inappropriately exposed their bodies or suggested that they belonged to a gang. The policy was intended to apply only to people in the courtroom, not to everyone who wished to enter the courthouse.

However, the record shows that court employees enforced the business-attire policy against everyone who sought entry to the courthouse. There was evidence that litigants were prejudiced by this policy and that some visitors were inappropriately denied access to the courthouse. In her responsive brief, respondent argued that "somehow [the business-attire policy] was improperly enforced . . . ." (Emphasis omitted.) She refused to acknowledge that she alone was responsible for overseeing the enforcement of her dress policy in the 22d District Court. The master noted that, although the judicial canons allow a judge to require that certain attire be worn in the courtroom, the requirements must be reasonable.

In addition, respondent simply cannot be allowed to plead ignorance about how her business-attire policy was enforced in the court she controlled. Under the court rules, a "judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides."[19] Respondent was the lone judge in her court, and she was responsible for implementing the business-attire policy; therefore, she was responsible for its

[19] MCR 9.205(A).

proper and reasonable enforcement.[20] Respondent should have known that people were appearing for court and being turned away because of her policy. And she should have taken steps to prevent this from happening.

C. EMPLOYMENT IMPROPRIETIES

The master and the JTC found that respondent knowingly rehired an unqualified magistrate in violation of MCL 600.8501 and MCL 600.8507 and misrepresented that he was qualified.[21] We agree. Even more troubling, respondent required the magistrate to sign bench warrants in violation of MCL 600.8511.[22] As a consequence, approximately 15,000 bench warrants were improperly issued and had to be reissued after respondent's suspension. Respondent testified that she did not instruct the magistrate to sign the warrants. However, the magistrate testified that signing bench warrants was one of his responsibilities. Making respondent's contention even less credible is the fact that she was the only person at the 22d District Court who

[20] The master also found that this conduct violated MCR 9.104(1) because it was prejudicial to the proper administration of justice.

[21] A magistrate is required by MCL 600.8501 and MCL 600.8507 to be a resident and registered elector. Respondent attempted to circumvent these requirements by hiring a magistrate pursuant to a multidistrict plan. The State Court Administrative Office rescinded the appointment because the magistrate did not meet the residency requirements. One month later, respondent reappointed the same magistrate and signed Local Administrative Order 2002-5, attesting that he was a resident and registered elector of Inkster. Respondent argued that she thought the magistrate was qualified. He testified that he was not a resident of Inkster and was not a registered voter in the city. Respondent failed in her duty to verify this information before she attested to its truthfulness in LAO 2002-5 and before she rehired the magistrate.

[22] MCL 600.8511 permits magistrates to sign arrest warrants, not bench warrants.

had the legal authority to sign bench warrants. It is impossible that she would not have noticed the significant drop in the number of warrants she was signing after rehiring this magistrate.

The JTC findings also established that respondent violated the Supreme Court's antinepotism policy by hiring her niece. The Court's antinepotism policy[23] allows family members to continue working for the court if they were employed by the court at the time the policy was enacted. Respondent's niece worked for the court when the policy was enacted but later resigned. About six months later, respondent rehired her niece, which violated the policy. Respondent claimed that although she knew of the violation, she thought the rehiring complied with a policy of the city of Inkster. Paradoxically, respondent had told the city that court employees were not subject to the city's employment rules. Respondent had a duty to contact the State Court Administrative Office to determine the proper course of action when court policy conflicted with the city's policy. She made no effort to do this.

D. MISREPRESENTATIONS TO THE MASTER AND THE JTC

The master and the JTC found that respondent made misrepresentations during the investigation and the hearing, including lying under oath. This Court agrees with those findings.

In March 2011, using court funds, respondent purchased a $350 airline ticket for herself to attend a judicial conference in California. She did not attend the conference and exchanged the unused ticket for another that she used for a non-court-related trip. Respondent testified before the master that the airline ticket was

[23] Administrative Order No. 1996-11.

"worthless." However, the record established that after the airline assessed a penalty of $150, respondent used the remaining $200 toward a $249 plane ticket for personal travel after being suspended from office.

Another incident involved a plane ticket for a conference in Massachusetts. Respondent issued a check from the CSP account to herself for $349.40, which she estimated to be the round-trip cost for the trip. She actually paid $7.50 for the ticket she purchased using frequent-flier miles. It is undisputed that respondent did not reimburse the CSP account for the difference. She testified that she was not overcompensated for her ticket because it would have cost $1,137.50 if she had paid for the 32,500 frequent-flier miles she used to purchase the ticket.[24] However, testimony at the hearing established that frequent-flier miles have no actual cash value because they cannot be sold or converted for cash. They are more akin to coupons. It was also shown that respondent could have purchased a ticket for much less than $1,137.50. It is apparent that respondent knew this because she wrote herself a check for $349.40, not $1,137.50.

Respondent also testified under oath that after appointing the magistrate she informed him that "he would have to become a registered elector as well as a resident of the city of Inkster." However, the magistrate testified to the contrary, saying that he "never knew" that being a registered elector was a requirement of the position. Moreover, respondent testified that she received a letter from the magistrate confirming his qualifications and attaching a copy of his voter's registration card. However, the magistrate testified that he did not provide such a letter. Moreover, he said that he knew "for certain" that he had never provided a copy of

[24] The price for a frequent-flier mile is $0.35.

his voter's registration card to respondent because he was never a registered voter in Inkster. The master specifically found the magistrate's testimony "credible" and respondent's testimony "not credible." As the master was in a superior position to observe the witnesses' demeanor and assess their credibility,[25] we are left with the conclusion that respondent lied under oath.

As discussed previously, respondent also denied that she instructed the magistrate to sign bench warrants. However, the magistrate testified that respondent assigned this duty to him. The master specifically found the magistrate's "testimony that Respondent required him to sign bench warrants credible."

Other misrepresentations made by respondent included the following: (1) she denied receiving any personal benefit from the various advertisements she purchased with CSP funds, (2) she denied that she was on notice of the requirement to establish a budget for the CSP account, and (3) she denied failing to take appropriate action to recover refunds owing from overpayments for court-related travel.

III. CONCLUSION

"The purpose of these proceedings is not to impose punishment on the respondent judge, . . . but to protect the people from corruption and abuse on the part of those who wield judicial power."[26] In determining appropriate sanctions, we seek to "restore and maintain the dignity and impartiality of the judiciary and to protect the public."[27]

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[25] *In re Noecker*, 472 Mich 1, 9-10; 691 NW2d 440 (2005).

[26] *Jenkins*, 437 Mich at 28.

[27] *Ferrara*, 458 Mich at 372.

In a case similar to this one that also involved substantial and pervasive misconduct, we removed a judge from office for the remainder of his term.[28] Judge James's misconduct persisted for years, permeating and infecting every corner of the 22d District Court. For this reason and for the others stated in this opinion, we agree with the JTC's recommendation and order that respondent be removed from office.[29]

The JTC is directed to submit a bill of costs to the Court. It is to include an itemization pursuant to MCR 9.205(B) showing the costs, fees, and expenses incurred by the JTC in prosecuting the complaint.[30] In addition, because certain of the misappropriated funds were by law to be paid to crime victims, the JTC may specify the amount that respondent should have allotted to victim restitution.[31] Respondent shall be given an opportunity to respond to the bill of costs.

Pursuant to MCR 9.226, the Court will not accept motions for rehearing on the merits of this opinion. The Clerk of the Court is directed to issue the judgment order

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[28] *In re Justin*, 490 Mich 394; 809 NW2d 126 (2012).

[29] Respondent is no longer a judicial officer and will not be an incumbent at the time of the 2012 general election for the 22d District Court. See *In re Nettles-Nickerson*, 481 Mich 321, 323; 750 NW2d 560 (2008).

[30] MCR 9.205(B).

[31] Const 1963, art 6, § 4. The superintending power of the Supreme Court has been interpreted as extremely broad and inclusive:

> "It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. . . ."
>
> . . . [I]ts purpose [is] "to keep the courts themselves 'within bounds' and to insure the harmonious working of our judicial system." [*In re Huff*, 352 Mich 402, 417-418; 91 NW 2d 613 (1958) (citations omitted).]

forthwith in accordance with this opinion and MCR 7.317(C)(3).

YOUNG, C.J., and MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with MARILYN KELLY, J.

CAVANAGH and HATHAWAY, JJ. We concur in the majority's result of removal from office and its decision to direct the Judicial Tenure Commission to submit an itemized bill of costs pursuant to MCR 9.205(B).

MARKMAN, J. (*concurring in part and dissenting in part*). I agree with the majority that Judge Sylvia James used several hundred thousand dollars of public funds as her "personal piggybank," without regard for either the law or the victims of crime within the city of Inkster who were entitled to have received a share of those funds; violated court policy by hiring a family member; and lied under oath during the investigation and hearing conducted by the Judicial Tenure Commission (JTC) and the master appointed in this case. I also agree that this misconduct compels the removal of Judge James from office, as well as the payment of costs and restitution for the funds diverted from the victims of crime within Inkster.

I respectfully disagree, however, that the sanctions imposed on Judge James by the majority sufficiently address the continuing harm that her misconduct has inflicted on the integrity of the judiciary in our state. The Michigan Constitution confers on this Court the duty of exercising superintending control over the lower courts. In my judgment, this responsibility to protect the integrity of our justice system requires in this case that Judge James also be conditionally suspended for a period of six years, or one full term of the court on which she currently presides.

I. INTEGRITY OF THE JUDICIARY

As Chief Justice Marshall so famously stated in *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), it is, "emphatically, the province and duty of the judicial department, to say what the law is." This, of course, leads to the question, "Who shall keep the keepers?" *In re Del Rio*, 400 Mich 665, 726; 256 NW2d 727 (1977) (quotation marks and citation omitted). Our state constitution "vests this solemn responsibility" in this Court. *Id.* at 726. Const 1963, art 6, § 4 provides:

> The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by the rules of the supreme court.

We observed in *Ransford v Graham*, 374 Mich 104, 108; 131 NW2d 201 (1964), that the power of general superintending control may be exercised "for the purpose of protecting the purity of judicial processes and maintaining public confidence in the administration of justice." As head of the state judiciary, this Court is charged with keeping the courts within bounds and ensuring " 'the harmonious working of our judicial system.' " *In re Huff*, 352 Mich 402, 418; 91 NW2d 613 (1958) (citation omitted). This duty to protect the integrity of the judiciary should not be taken lightly and must be considered in all cases involving judicial misconduct. In *In re Probert*, 411 Mich 210, 231; 308 NW2d 773 (1981), this Court stressed that our judicial system "is only as good as its constituent judges." We explained:

> [W]hen one commits judicial misconduct he not only marks himself as a potential subject of judicial discipline, he denigrates an institution. Accordingly, a decision on judicial discipline must also be responsive to a significant institutional consideration, "the preservation of the integ-

> rity of the judicial system." Institutional integrity, after all, is at the core of institutional effectiveness.

Id. at 225. Indeed, proceedings such as this exist not to punish, but to maintain standards of judicial fitness. *In re Mikesell*, 396 Mich 517, 527; 243 NW2d 86 (1976). Accordingly, the driving force behind judicial discipline is always the preservation of the integrity of the judicial system:

> The functions and decisions of a judge have an incalculable impact on the community at large. A citizen's experience with the law is often confined to contact with the courts. Therefore, it is important not only that the integrity of the judiciary be preserved but that the appearance of that integrity be maintained.
>
> * * *
>
> "For generations before and since it has been taught that a judge must possess the confidence of the community; that he must not only be independent and honest, but, equally important, believed by all men to be independent and honest. A cloud of witnesses testify that 'justice must not only be done, it must be seen to be done.' Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy."

Del Rio, 400 Mich at 725 (citations omitted). To accomplish this end, the state and this Court can prescribe appropriate standards of conduct for those who hold state elective judicial office. *Id.* at 683. These standards, set forth in MCR 9.104 and MCR 9.205,[1] are designed to preserve judicial integrity by guarding against harmful conduct by those holding elective judicial office.

Particularly in the circumstances of this case, it bears emphasizing that the elective nature of the judicial office does not relieve this Court of its duty to preserve the

[1] MCR 9.104 sets forth general grounds for attorney discipline, while MCR 9.205 sets forth rules of judicial conduct.

integrity of the judiciary, nor does the fact of popular election insulate or immunize a judge from the consequences of his or her misconduct, any more than an elected public official is insulated or immunized by election to office from being held to account for criminal law violations. To be sure, the elective power of the people does include the responsibility to ensure the qualifications of those elected, but they do not bear this responsibility alone.[2] Our Constitution provides that in addition to this responsibility on the part of the electorate, this Court has a separate and distinct duty to uphold the integrity of the judiciary. The people's discharge of their duty through election does not discharge this Court's separate duty to preserve the integrity of the judiciary. Rather, this Court's obligation to maintain the integrity of the judicial branch is indissoluble, and the fact of election does not dispel the harmful effects of judicial misconduct, either within or beyond the boundaries of the election district.

As noted, our Constitution vests in this Court the primary responsibility to "keep the keepers." The people are entitled to a judiciary of the highest integrity, in both appearance and in fact, and this Court always bears the obligation under the constitution adopted by "we the people" to maintain and enforce standards of judicial fitness.

II. POWER OF THE COURT

This Court's authority to sanction a judge can be found in Const 1963, art 6, §§ 4 and 30. While § 4

[2] The people's right to the service of a judge whom they have elected is also not absolute, but "is subject to express and distinct limitations and qualifications provided for by the Constitution and statutes." *Del Rio*, 400 Mich at 685 n 6; see also *Huff*, 352 Mich at 414.

provides this Court's general superintending authority over courts, § 30(2) provides, in relevant part:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.

Furthermore, the JTC's specific recommendation is not binding upon this Court. MCR 9.225 provides, in relevant part:

> The Supreme Court shall review the record of the proceedings and file a written opinion and judgment, which may accept or reject the recommendations of the commission, or modify the recommendations by imposing a greater, lesser, or entirely different sanction.

In other words, the fact that the JTC did not recommend a particular sanction does not preclude this Court from imposing what it determines to be an appropriate and proportionate sanction. Thus, the only limitation on this Court's authority to redress judicial misconduct in article 6, § 4 is that this Court may not use § 4 power to remove a judge, although we may remove a judge upon a disciplinary recommendation of the JTC under article 6, § 30. In fact, the superintending control power vested by § 4 is extremely broad:

> "The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it,

> possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted. This power is not limited by forms of procedure or by the writ used for its exercise."

Huff, 352 Mich at 417-418 (citation omitted); see also *In re Hathaway*, 464 Mich 672, 684 n 8; 630 NW2d 850 (2001).

Suspension from office is one sanction expressly listed in Const 1963, art 6, § 30. This Court has clarified that "suspension," which is an " 'ad interim stoppage or arrest of official power and pay,' " is not synonymous with "removal," which " 'terminates wholly the incumbency of the office or employment.' " *Probert*, 411 Mich at 229 n 11, quoting Black's Law Dictionary (4th rev ed), p 1616. Further, "[n]either 'suspension' nor 'removal' connotes a *permanent* disqualification from office." *Probert*, 411 Mich at 229 n 11 (emphasis in original). The power to suspend is also not limited to cases in which the judge currently holds judicial office. As this Court noted in *Probert*, we possess the authority under the constitution to issue conditional suspensions that "foreclose[] the exercise of the prerogatives inhering in any judicial office to which the disciplined party might have been elected or appointed in the future, the condition being, of course, re-election or appointment to judicial office." *Id*. at 224, citing *Mikesell*, 396 Mich at 549, *Del Rio*, 400 Mich at 672 nn 3 and 4, and *In re Bennett*, 403 Mich 178, 200; 267 NW2d 914 (1978).

Such conditional suspensions "disengage the disciplined party from judicial power" only if the person occupies judicial office again during the term of the suspension and do not permanently enjoin the person from holding judicial office. *Probert*, 411 Mich at 224, 232-233. This Court has historically issued conditional suspensions when other sanctions could not fully and

adequately address the effect of particular misconduct on the integrity of the judicial system. See *id.* at 225-228; *Del Rio*, 400 Mich at 725-726. Although often the greatest danger will pass once "an unfit or incompetent judge is separated from judicial power," this Court should not refuse to consider other sanctions, such as conditional suspensions, when removal alone cannot sufficiently protect the integrity of the judiciary. *Probert*, 411 Mich at 227-228.

III. APPLICATION

Turning to the matter now before this Court, I believe that any sanction imposed must address not only the immediate effects of Judge James' misconduct, but also the extent of the harm she has done to the integrity of the judicial system and the likelihood that the harm will continue. In *Probert*, 411 Mich at 228 n 10, we set forth a number of factors to consider in determining the appropriateness of a sanction that operates after a judge has left judicial office: (1) the likelihood of reelection to judicial office, (2) the gravity of the misconduct, and (3) the importance of official reprobation to public confidence and trust in the integrity of the judicial system. Consideration of these factors, along with the specific details of Judge James' misconduct in the instant case, leads inescapably, in my judgment, to the conclusion that removal and restitution alone cannot fully and adequately redress the harm that she has caused to the integrity of the judiciary. Accordingly, I would impose on her a six-year conditional suspension in addition to the removal imposed by the majority and the itemization of costs it has ordered.

In *In re Brown*, 461 Mich 1291, 1292-1293 (2000), this Court provided seven factors to guide the formation of judicial-discipline recommendations. This case, I be-

lieve, implicates the following *Brown* factors, all weighing in on the "more serious" side of the scale: (1) misconduct that is part of a pattern or practice, (2) misconduct that is prejudicial to the actual administration of the justice, (3) misconduct giving the appearance of impropriety, and (4) misconduct that is premeditated or deliberated. After considering these factors, I cannot agree with the majority that removal alone constitutes an appropriate response to the seriousness of the misconduct at issue.

The evidence clearly establishes that Judge James' misconduct was prejudicial to the actual administration of justice, as her private use of hundreds of thousands of dollars of public funds prevented those funds from being used for their proper purposes, including provisions of assistance for the victims of crime within Inkster. As the majority has detailed, Judge James treated public funds, including funds statutorily required to go to victims of crime, as her own "publicly-funded, private charitable foundation" of which she was the sole administrator. In so doing, Judge James routinely ignored or circumvented legal requirements that conflicted with her own personal desires. Although Judge James places great importance on the fact that she provided some of the misappropriated funds to worthy charitable or civic organizations, she fails to acknowledge that her "contributions" invariably served her own electoral purposes as well and were sometimes the equivalent of publicly-subsidized campaign advertisements.[3] And not all the money, by any means, was given to such organizations. Instead, Judge James also

[3] Judge James improperly authorized at least 47 checks (totaling more than $13,000) from public funds to charitable, civic, fraternal, and religious organizations. In every instance, the contribution predominately promoted Judge James, not the public mission of the court or any particular court program.

used public funds to pay for improper travel and, among other things, provide gifts to other public officials who had undertaken actions favorable to her court.

Moreover, Judge James continues to fail to acknowledge that she possessed no authority to expend public monies in violation of the law.[4] Rather, she was entrusted, both through her office and by statute, to distribute those funds according to the laws enacted by the elected representatives of the people of Inkster and those of all other residents of this state. In so doing, Judge James placed her own desires and preferences above the law, and above the rights of the victims of crimes within the city of Inkster who were entitled to these funds by the laws Judge James chose to ignore. This refusal to be bound by the law effectively resulted in these victims of crime being victimized twice—once by the criminal perpetrator and a second time by the very judicial body in which they sought justice and restitution.[5]

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[4] If a bank teller, for example, accepted a check and deposited the check into her favorite charitable account instead of depositing the funds into the account specified on the check, the fact that the misdirected funds were given to a worthy charity would not justify the teller's misconduct of using someone else's money for her own private purposes. Judge James does not seem to clearly apprehend this and continues to justify her actions on the ground that she did not directly put the money in her pocket. This was the crux of her defense at the JTC and before this Court.

[5] Judge James' refusal to consider both the propriety and the effect of her actions was also evident in her employment of a family member in violation of an antinepotism policy and her institution and enforcement of a dubious business-attire policy for the public. After instituting this policy, Judge James ignored the fact that both the policy and its enforcement by court staff had the effect of denying some members of the public access to the court. Importantly, this denial of access went beyond unnecessarily inconveniencing members of the public; in at least one instance, court staff prevented a party to a case from entering the building even to reschedule his hearing, resulting in a default judgment

Her improper institution and enforcement of the business-attire policy were also prejudicial to the administration of justice, barring litigants' access to the justice system itself. Her improper hiring of her niece, in violation of the court's antinepotism policy, also communicated the appearance of impropriety. And virtually all of her misconduct was thoroughly deliberate and premeditated, requiring that policies be instituted, computer systems be overridden, expenditures be planned and implemented, records be distorted, long-range travel plans be undertaken, and ways be devised to ensure unchecked and improper access to public funds.

But the most disturbing factor, and the one that arguably presents the greatest danger to the integrity of the judiciary, is that Judge James' misconduct was part of an enduring pattern or practice that she has shown no intention of changing. Her behavior and statements before, during, and after the investigation and hearing demonstrate that Judge James refuses to be bound by any law or requirement that conflicts with her own desires. This sustained pattern of misconduct and disregard for the law precludes, in my judgment, sympathetic consideration of Judge James' behavior. "We simply cannot overlook a disclosed pattern [of misconduct]. Once such pattern is discovered, the opportunity of continuity thereof must be concluded with firmness and resolution." *In re Graham*, 366 Mich 268, 276; 114 NW2d 333 (1962). In this case, removal alone, which may accomplish nothing more than removing her from the bench for a period of fewer than five months, will not divest from Judge James all opportunity to continue

being entered against him while he stood helplessly outside. It is a Kafkaesque world indeed when a citizen has a judgment entered against him for failure to appear by the very same court that prohibited his appearance in the first place.

her pattern of misconduct and her cavalier approach to her responsibilities as a district judge.

The inadequacy of removal is further demonstrated by Judge James' practice of being unrestrained by her oath to tell the truth. During the course of this investigation and hearing, Judge James lied numerous times. For example, Judge James not only falsely stated that a candidate was qualified to be magistrate, she then continued to lie when confronted about the first falsehood. Judge James further lied in stating that it was the funding authority that issued the improper checks, not her. The funding authority, however, never administered or managed the account from which the checks were drawn. In fact, Judge James opened the account when the funding authority questioned some of her check requests. Judge James also falsely submitted in her answer that the decision to close the court bank accounts was made by the bank and that the decision "forced" her court administrator to obtain a new federal tax identification number and open new accounts elsewhere. A letter from the court administrator to the bank (directed by Judge James) clearly stated that the decision was the "court's and not the bank's." Further, Judge James instructed her administrator to obtain a new tax identification number before the accounts at the bank were closed.

Judge James also falsely stated that she derived no benefit from the issuance of the various checks to the civic and charitable organizations, when the advertisements prominently featured her name and photograph and had the appearance of campaign literature. Similarly, Judge James falsely submitted in her answer that she was only an honorary member of the Booker & Flora Dozier Memorial Scholarship organization (one of the organizations to which she improperly directed

public funds), when she actually served as a committee member and voted on which applications should receive scholarships. Judge James also falsely stated that she was not an active member of the Delta Sigma Theta sorority (another organization that received public funds from Judge James), when in fact she is a lifetime member. Finally, Judge James lied about reimbursements she had received for travel expenses and pocketed public monies in excess of the actual costs. Thus, Judge James not only received an improper monetary benefit, but she lied about it when this was brought to her attention.

The provision of false testimony or evidence in a JTC proceeding has generally led to removal from office. *In re Servaas*, 484 Mich 634, 716 n 11; 774 NW2d 46 (2009) (YOUNG, J., dissenting). This Court also explained the importance of truthfulness in *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998):

> Judges, occupying the watchtower of our system of justice, should preserve, if not uplift, the standard of truth, not trample it underfoot or hide in its shady recesses. This is precisely why judges should be exemplars of respectful, forthright, and appropriate conduct.

Lying under oath is the antithesis of judicial integrity. When faced with such misconduct, this Court must take pains to adequately address the harm inflicted and protected against future harm if necessary. See *In re Ryman*, 394 Mich 637; 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514; 384 NW2d 9 (1986); *Ferrara*, 458 Mich 350; *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005); *In re Nettles–Nickerson*, 481 Mich 321; 750 NW2d 560 (2008).

I agree with the Judicial Tenure Commission and the majority opinion that Judge James' misconduct violated Const 1963, art 6, § 30, MCR 9.104(A)(1) (conduct

prejudicial to the proper administration of justice); MCR 9.104(A)(2) (conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach); MCR 9.205(A) (a judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides); MCR 9.205(B)(1) (misconduct in office); Code of Judicial Conduct, Canons 1 (uphold the integrity and independence of the judiciary), 2(A) (avoid all impropriety and appearance of impropriety), 2(B) (respect and observe the law), 2(C) (not allow family, social, or other relationships to influence judicial conduct or judgment), 3(A)(1) (be faithful to the law and maintain professional competence in it and be unswayed by partisan interests, public clamor, or fear of criticism), 3(A)(2) (enforce reasonable rules of attire and conduct in the courtroom.), 3(B)(1) (diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.), and 6(B) (expense reimbursement limited to the actual cost of travel, food, and lodging reasonably incurred by the judge); MCL 600.4803 (court must transmit to the treasurer or chief financial officer of the funding unit of the court late penalties received within 30 days after receipt of the penalty); MCL 600.8379 (proper allocation of fines and costs); MCL 600.8501 (appointment of magistrates); MCL 600.8507 (qualifications of magistrates); MCL 750.174 (embezzlement by fiduciary); MCL 750.175 (embezzlement by public officer); MCL 750.218 (use of false pretenses with intent to defraud); MCL 750.249 (uttering and publishing); and Administrative Order 1996-11 (antinepotism policy).

Underlying this misconduct, however, is a common theme: Judge James' refusal to conform her actions to

the requirements of the law, a law to which she was bound, as are all other citizens. Judge James' actions, in short, that she believed she was *above* the law and not *within* the law. Her actions demonstrate a pattern of ignoring laws or requirements that conflicted with her personal desires and judgment. Even more troubling, her actions during the investigation and hearing below demonstrate a complete lack of remorse or acknowledgement of wrongdoing. Nowhere in the record does Judge James concede that her actions and decisions were inappropriate and unlawful; instead, she repeatedly attempted to justify her misconduct, arguing that no one had previously complained of the improprieties, that she was not aware of the legal requirements,[6] that others were to blame for her actions, that she was not responsible for the actions of her court staff, and that any ancillary benefit to charitable or civic organizations justified her actions.

Taken together, these justifications reveal a refusal to conform her actions to the requirements of the law, as if statutory requirements and judicial canons are mere suggestions that may be regarded or disregarded at her will. It is this refusal to be bound by the laws of this state that, in my opinion, poses the greatest harm to the integrity of the judiciary and must therefore be effectively addressed.

Although the majority's ordering removal from office addresses the immediate harm caused by Judge James, it is an inadequate response and fails to address the likelihood of continuing harm. As a result of the majority's decision, Judge James will be removed from office

[6] Aside from the fact that Judge James was, in fact, informed of both the law and her noncompliance, her assertion that a judge has no duty to know the law governing the judge's day-to-day responsibilities and actions defies logic.

from today's date until the expiration of her present term at the end of 2012. She has her name on the August primary ballot, however. If she is successful in the primary, her name will be placed on the ballot for the general election in November. And should she prevail in those elections, she will be allowed to resume her judgeship on January 1, 2013.

In sum, following today's decision: (1) Judge James will appear and be designated as a "judge" on the August 7 primary ballot, (2) if Judge James is among the top two finishers in that primary, she will stand for reelection on November 6, although no longer designated as the incumbent "judge," (3) Judge James will be allowed to campaign continuously for judicial office between the time of today's decision and the November election, referring to herself if she chooses as a "past chief judge" or as "former judge," and (4) if Judge James is reelected in November, she will be allowed to retake office and serve the next six-year term of the court beginning on January 1 of next year. And whether by that time Judge James has or has not made full restitution to the city of Inkster or to individual victims of crime within Inkster, she may resume her "public service" after a "removal" from judicial office of less than five months. Such a sanction is inadequate, in my judgment, and does not satisfy what I view as this Court's obligation under our superintending authority over the judiciary to preserve the integrity of Michigan's courts.

Given Judge James' lack of remorse and continuing refusal to acknowledge that she too is bound by the laws of this state, there is no reason to believe that Judge James will not continue to place her own will above the will of the people. Again, it is of no moment for what constitutes a proportionate sanction against Judge

James that she may again be elected to judicial office this year. The harmful effect of her misconduct on the judiciary extends beyond the geographical limits of her judicial district, and this Court must ensure that our sanctions for judicial misconduct are viewed as adequate in Alpena and Muskegon and Battle Creek, as well as in Inkster. And a victim of crime within Inkster who was due restitution from the fund depleted by Judge James is entitled to an honest court in Inkster whether her or she has come into that community from Dearborn or Wyandotte or Trenton. Const 1963, art 6, § 1 proclaims that there is but "one court of justice" in this state, and the actions of Judge James have implications for the reputation and integrity of the judiciary throughout our state.

This Court has a duty to redress the harms done by Judge James' harm, and that duty is not vitiated if Judge James is reelected. Nor is that duty limited to past harm; rather, it also extends to guarding against future harm. Imposing a six-year conditional suspension, which would be in effect throughout the next judicial term, is the only way this Court can adequately protect judicial integrity and redress the substantial harm caused by Judge James's refusal to be bound by the same laws she is charged with applying.

IV. CONCLUSION

Although I concur with the majority that Judge James's misconduct warrants removal and the payment of restitution for the diversion of public funds into her "personal piggybank" and as part of her "publicly-funded private foundation," I do not think that this sanction sufficiently addresses the harm done to the integrity of the judiciary. In light of this Court's responsibility to ensure the integrity of our judicial system,

both in appearance and in fact, and in light of the serious misconduct by Judge James that directly impugns the integrity of our "one court of justice" and because of her serious abuse of the public trust, financial and otherwise, I would impose a six-year conditional suspension in addition to the sanctions imposed by the majority.

YOUNG, C.J., concurred with MARKMAN, J.

STAND UP FOR DEMOCRACY v SECRETARY OF STATE

Docket No. 145387. Argued July 25, 2012. Decided August 3, 2012.

Stand Up For Democracy, a ballot question committee, filed an original action in the Michigan Court of Appeals against the Secretary of State and the Board of State Canvassers, seeking a writ of mandamus directing the board to certify a referendum petition the committee had circulated and directing the Secretary of State to take all appropriate action to ensure that the referendum was placed on the November 2012 general election ballot. Citizens for Fiscal Responsibility, a ballot question committee opposing the referendum, moved to intervene. The Court of Appeals granted the motion to intervene in an unpublished order, entered May 11, 2012 (Docket No. 310047). Stand Up For Democracy sought a referendum on the Local Government and School District Fiscal Accountability Act, 2011 PA 4, MCL 141.1501 *et seq*., commonly known as the "emergency financial manager law," and submitted more than 24,000 referendum petition sheets containing 226,339 signatures to the Bureau of Elections. The bureau concluded that Stand Up For Democracy had submitted more than enough valid signatures to have the question placed on the ballot. Citizens for Fiscal Responsibility timely challenged the petition before the board on several grounds, including that the type size of the heading on the petition sheets did not comply with MCL 168.482(2), which requires that referendum petition headings be printed in capital letters in 14-point boldfaced type. Two members of the board voted in favor of a motion to approve the petition. Two members of the board voted against the motion. Accordingly, the motion failed and the petition was not certified. Stand Up For Democracy subsequently filed its complaint for a writ of mandamus in the Court of Appeals and moved for immediate consideration of the complaint and oral argument. The Court granted the motions for immediate consideration and oral argument in an unpublished order, entered May 7, 2012 (Docket No. 310047). Following oral argument, the Court of Appeals, WILDER, P.J., and K. F. KELLY and RIORDAN, JJ., concluded that the petition heading was not printed in 14-point type, but that certification was compelled under *Bloomfield Charter Twp v Oakland Co Clerk*,

253 Mich App 1 (2002), because the petition substantially complied with the 14-point-type requirement. 297 Mich App 45 (2012). However, the Court stated that but for MCR 7.215(J)(1), which required it to follow *Bloomfield*, it would have ruled that the petition was invalid, and it therefore called for the convening of a special panel under MCR 7.215(J)(3) for the purpose of resolving the conflict that would have been created except for the provisions of MCR 7.215(J)(1). A majority of the Court of Appeals declined to convene the special panel. 297 Mich App 801 (2012). Citizens for Fiscal Responsibility sought leave to appeal and moved for immediate consideration. The Supreme Court granted the motion for immediate consideration and ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 491 Mich 950 (2012).

In a lead opinion by Justice MARY BETH KELLY, an opinion by Chief Justice YOUNG, joined by Justice ZAHRA, and an opinion by Justice MARKMAN, the Supreme Court *held*:

The language of MCL 168.482(2), requiring that the petition heading be printed in 14-point type, is mandatory and, therefore, the doctrine of substantial compliance was inapplicable to referendum petitions submitted to the board for certification. The decision and the writ of mandamus issued by the Court of Appeals was reversed and *Bloomfield* was overruled.

In a lead opinion by Justice MARY BETH KELLY and an opinion by Justices CAVANAGH, MARILYN KELLY, and HATHAWAY, the Supreme Court *held*:

A new writ of mandamus must be entered directing the Board of State Canvassers to certify Stand Up For Democracy's petition for the ballot.

Court of Appeals' judgment reversed; new writ of mandamus issued, directing the Board of State Canvassers to certify Stand Up For Democracy's petition for the ballot; Michigan Supreme Court Clerk directed to issue the judgment order forthwith pursuant to MCR 7.317(C)(3).

In the lead opinion by Justice MARY BETH KELLY, joined in the following respects by Chief Justice YOUNG and Justice ZAHRA, she further stated that the Legislature's use of the mandatory term "shall" in MCL 168.482(2) indicates that the 14-point-type requirement was mandatory. Had the Legislature intended that substantial compliance be permitted in this instance, it could have constructed language permitting substantial compliance as it did in other provisions of the Michigan Election Law, MCL 168.1 *et seq*. Because the type-size requirement was mandatory, the peti-

tion had to actually comply with the type-size requirement unless another statutory provision specifically allowed substantial compliance. To the extent that MCL 168.544d permits substantial compliance for petitions that are circulated countywide, it permits only the Secretary of State to prescribe petition requirements that are in substantial compliance with the mandated petition requirements, and the Secretary of State's prescribed form, as permitted by MCL 168.544d, mandated strict compliance with the 14-point-type requirement. Although a line of Michigan Court of Appeals cases had applied the doctrine of substantial compliance before an election, that line of cases was inconsistent with the statutory scheme and Michigan Supreme Court jurisprudence. Because there was no statutory provision that permitted substantial compliance in this case and the language of MCL 168.482(2) is mandatory, Stand Up For Democracy could not prevail on the ground that it substantially complied with the 14-point-type requirement. Because this error of law was essential to the Court of Appeals' ruling, it is necessary to clarify that substantial compliance was insufficient to entitle Stand Up For Democracy to certification of its petition. With regard to actual compliance, the traditional definitions of "point" and "type" have not substantially changed since the enactment of the statute. A point is a unit that is used to measure the size of type used in printing and that is equivalent to about $^{1}/_{72}$ inch. A type is a rectangular block, usually of metal or wood, having its face so shaped as to produce, in printing, a letter, figure, or other character. The letters do not cover the entire surface of the type because the type includes spacing above or below the letters to prevent the printed letters from touching. Contrary to the Court of Appeals' conclusion, it is the size of the type that must be measured and not the resulting printed letters, because the point measurement measures type size, which is the entire vertical length of the printer's block, which necessarily incorporates some amount of blank space so that the capital letters printed in 14-point type do not necessarily measure $^{14}/_{72}$ of an inch.

In the lead opinion by Justice MARY BETH KELLY, she further noted that the Secretary of State and the Board of State Canvassers conceded that the traditional meanings of point and type were transferrable to digital text. Justice MARY BETH KELLY also took judicial notice of the fact that in several online guides, Microsoft defined the relevant terms consistently with their traditional meanings. Because digital type and physical type are functional equivalents, they are measured in the same manner except in the case of digital type; in that instance, an invisible box, which replicates the printer's block, is measured and is reflected by the

font size. Applying these definitions to the evidence, Citizens for Fiscal Responsibility failed to establish that the petition heading was not in 14-point type, and Stand Up For Democracy presented evidence that it actually complied with the type-size requirement. Because the petition actually complied with the type-size requirement, the board was obligated to certify the petition. Stand Up For Democracy was entitled to a new writ of mandamus requiring the board to certify its petition for the ballot.

Chief Justice YOUNG, joined by Justice ZAHRA, concurring in part and dissenting in part, joined parts I, II, III(A), and III(B)(1) of Justice MARY BETH KELLY's lead opinion. Chief Justice YOUNG agreed with Justices MARY BETH KELLY and MARKMAN that actual compliance with the statutory type requirements was mandated and that, therefore, the judge-made doctrine of substantial compliance was insufficient to entitle plaintiff to certification of its petition. Chief Justice YOUNG also agreed with Justice MARY BETH KELLY that the statutory "point" size requirement for "type" refers to the size of a traditional movable type block, not the size of the printed character on the petition. However, Chief Justice YOUNG concluded that plaintiff failed to establish that its petition heading met the statutory type and print requirements and would have denied Stand Up For Democracy's claim for mandamus. Chief Justice YOUNG further concluded that because the record did not address the controlling legal standards or the necessary factual predicate to satisfy the plaintiff's burden of proof, it was inappropriate to invoke judicial notice to resolve the open technical factual question whether Stand Up For Democracy's computer generated heading was a faithful replication of the statutorily required 14-point type. Notwithstanding the failure of proofs and because the Court of Appeals, the Secretary of State, and Stand Up For Democracy were all operating under an erroneous legal standard, Chief Justice YOUNG would have remanded the matter to the Board of State Canvassers to permit Stand Up For Democracy the opportunity to establish actual compliance under the proper legal standard. While the definitions of "point" and "type" were clear based on their customary technical meanings, it was not clear how to apply the historical definitions in the age of digital printing, and the available evidence was insufficient to conclude that Microsoft's digital fonts replicated the point measurement that the Legislature intended.

Justices CAVANAGH, MARILYN KELLY, and HATHAWAY, concurring in part and dissenting in part, voted to affirm the Court of Appeals and its issuance of mandamus and concurred with Justice MARY BETH KELLY that a writ of mandamus should enter, but strongly

dissented from the decision to abandon the substantial-compliance doctrine, stating that MCL 468.182(2), which was intended to protect the election process, had been turned into a barrier that could prevent a vote from taking place. The notion that courts may intervene in the political arena and preempt a vote of the people is inconsistent with the role of the courts and the principles of our democracy. Given Justice MARY BETH KELLY's finding of actual compliance—which must necessarily encompass substantial compliance because actual compliance is a higher standard than substantial compliance—there were four votes finding at least substantial compliance. The question of whether actual or substantial compliance was the proper standard was unnecessary to the decision in this case.

Justice MARKMAN, concurring in part and dissenting in part, concurred with Justice MARY BETH KELLY that Stand Up For Democracy must actually comply with the type-size requirement of MCL 168.482(2). Actual compliance is required because the Legislature used the word "shall," the law had been amended by the Legislature to repudiate the idea of approximateness, and the law explicitly limits the concept of substantial compliance to forms "prescribed by the secretary of state." To allow substantial compliance to satisfy the law when the Legislature did not authorize substantial compliance would be to accord more power to judges and less power to legislative bodies and the people they represent to say what the law is. The term "point" is a unit of type measurement equal to $1/72$ inch. The term "type" is defined consistently among dictionaries as either the blocks used to produce the letters or the actual printed letters themselves. That the Legislature used the words "printed" and "letters" indicates that the Legislature was referring to the actual printed letters rather than the blocks used to make the letters. This interpretation is consistent with the legislative purpose, namely, ensuring that the signers of petitions can easily read what they are signing. Because the heading on Stand Up For Democracy's petition was smaller than 14 points when measured in the customary manner, it was not in compliance with the statutory requirements and thus the committee was not entitled to a writ of mandamus.

ELECTIONS — REFERENDUMS — PETITIONS — TYPE SIZE — ACTUAL COMPLIANCE.

The statutory provision requiring that a referendum petition heading be printed in 14-point type is mandatory; substantial compliance with the statutory requirement is insufficient; rather, the petition heading must actually comply with the type-size requirement (MCL 168.482[2]).

The Sanders Law Firm, P.C. (by *Herbert A. Sanders*), *Goodman & Hurwitz PC* (by *William H. Goodman* and *Julie Hurwitz*), *Melvin Butch Hollowell, Esq, PC* (by *Melvin Butch Hollowell, Jr.*), and *John C. Philo* for Stand Up For Democracy.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Heather S. Meingast* and *Denise C. Barton*, Assistant Attorneys General, for the Secretary of State and the Board of State Canvassers.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for Citizens for Fiscal Responsibility.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Laura L. Moody* and *Mark G. Sands*, Assistant Attorneys General, for the Governor and the Attorney General.

Mark P. Fancher, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan.

Jocelyn Benson for the Michigan Center for Election Law.

MARY BETH KELLY, J. This case requires that we determine whether to grant a writ of mandamus in favor of plaintiff, Stand Up For Democracy, to compel the Board of State Canvassers to certify plaintiff's referendum petition for inclusion on the November 2012 ballot. Intervening defendant, Citizens for Fiscal Responsibility, challenged the certification of plaintiff's referendum petition, alleging that it failed to comply

with the type-size requirement of MCL 168.482(2) and that the doctrine of substantial compliance, whereby technical deficiencies are resolved in favor of certification, did not apply. The Court of Appeals agreed with both assertions, but concluded it was required to follow its decision in *Bloomfield Charter Township v Oakland County Clerk*[1] and conclude that the petition substantially complied with the type-size requirement of MCL 168.482(2) and that certification was required. Consequently, the Court of Appeals directed the board to certify the petition.[2]

However, because MCL 168.482(2) uses the mandatory term "shall" and does not, by its plain terms, permit certification of deficient petitions with regard to form or content, a majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification. Therefore, we reverse the Court of Appeals' judgment in this regard and we overrule *Bloomfield Charter Twp*.

Three justices of this Court further conclude that the type-size requirement of MCL 168.482(2) requires that the "type," not the "letters," of the petition heading measure 14 points. Because the Court of Appeals held that plaintiff failed to actually comply with the type-size requirement of MCL 168.482(2) given that the letters did not measure 14 points, we would also have reversed that portion of the Court of Appeals' judgment.

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[1] *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1; 654 NW2d 610 (2002).

[2] *Stand Up For Democracy v Secretary of State*, 297 Mich App 45; 824 NW2d 220 (2012). The Court of Appeals sought to convene a conflict panel, MCR 7.215(J)(2) and (3), but a majority of the Court declined to convene the panel in an order entered June 14, 2012. *Stand Up For Democracy v Secretary of State*, 297 Mich App 801 (2012).

Because a majority of this Court holds that a new writ of mandamus should enter directing the Board of State Canvassers to certify plaintiff's petition as sufficient, a majority of this Court directs the Board of State Canvassers to certify plaintiff's petition for the ballot. Pursuant to MCR 7.317(C)(3), we direct the Clerk of the Court to issue the judgment order forthwith.

I. FACTS AND PROCEDURAL HISTORY

On February 29, 2012, plaintiff filed its referendum petition to invoke a referendum with regard to 2011 PA 4, MCL 141.1501 *et seq*., the emergency financial manager law, and to request certification of the petition from the Board of State Canvassers.[3] The petition

[3] The people's power of referendum is a constitutional right. Const 1963, art 2, § 9 provides, in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. . . . The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the . . . referendum, petitions signed by a number of registered electors, not less than . . . five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

Once the Board of State Canvassers makes its official declaration of the sufficiency of a referendum petition and certifies the petition, the law subject to the referendum is no longer effective. See MCL 168.477(2) ("[A] law that is the subject of the referendum continues to be effective until the referendum is properly invoked, which occurs when the board of state canvassers makes its official declaration of the sufficiency of the referendum petition.").

contained 203,238 valid signatures, well exceeding the number necessary to certify the petition and to place the referendum on the November 2012 ballot. On March 14, 2012, plaintiff submitted its printer's affidavit attesting that the petition heading was "PRINTED IN CAPITAL LETTERS IN 14-POINT BOLDFACE TYPE[.]"

On April 9, 2012, intervenor filed a challenge to the form of plaintiff's referendum petition, asserting, in part, that the heading, "REFERENDUM OF LEGISLATION PROPOSED BY INITIATIVE PETITION," did not comply with the requirement of MCL 168.482(2) that the heading be "printed in capital letters in 14-point boldfaced type . . . ."

The Board of State Canvassers considered intervenor's challenge on April 26, 2012. At the hearing, intervenor asserted that the form and content requirements of MCL 168.482(2) are mandatory. Intervenor submitted two affidavits of two printers who reviewed the petition and stated that the petition was deficient because its heading did not measure 14-point type. Plaintiff countered that the board should apply the doctrine of substantial compliance and approve the petition and, alternatively, that its petition actually complied with the type-size requirement of the statute. Plaintiff relied on its printer's affidavit, as well as the expert testimony of two printers, in support of its argument. Plaintiff also criticized one of intervenor's expert's affidavits for simply measuring one of the capital letters in the heading.

At the close of the hearing, two members of the board voted in favor of a motion to certify the petition, reasoning that "there was more than substantial compliance, . . . there was total compliance." The remaining two board members voted to deny the motion, believing

there to be a "legitimate question as to the size of the words" and reasoning that substantial compliance is insufficient under MCL 168.482(2) given its mandatory language. Consequently, the board did not approve the motion to certify the petition.

Plaintiff then filed a complaint for mandamus in the Court of Appeals, requesting the Court to order defendants, the Board of State Canvassers and the Secretary of State, to certify the petition for inclusion on the November 2012 ballot because the board had a clear legal duty to certify the petition, because plaintiff either substantially or actually complied with the 14-point-type statutory requirement. The Court of Appeals first ruled that "the Calibri font utilized in plaintiff's petition heading is smaller than the prescribed 14-point type measurement of $^{14}/_{72}$ inches."[4] Without defining the term "type," the panel reasoned that "text that does not measure 14 point, or $^{14}/_{72}$ inches, is insufficient under the statute."[5] The Court of Appeals, however, concluded that it was bound to follow *Bloomfield Charter Twp* and concluded that plaintiff's petition had substantially complied with MCL 168.482(2).[6] The Court therefore granted plaintiff's complaint for a writ of mandamus, compelling inclusion of the referendum on the ballot.

We granted oral argument on the application for leave to appeal to consider "(1) whether plaintiff actually complied with the 14-point-type requirement in MCL 168.482(2), specifically given the terms 'point' and 'type'; and (2) if not, whether substantial compliance with the 14-point-type requirement in MCL 168.482(2) is sufficient to give plaintiff a clear legal right to certification

[4] *Stand Up For Democracy*, 297 Mich App at 67.

[5] *Id*. at 67.

[6] *Id*. at 68.

of the petition."[7] In lieu of granting leave to appeal, pursuant to MCR 7.302(H)(1) a majority of this Court concludes that the Court of Appeals' judgment is reversed, that substantial compliance is insufficient to certify plaintiff's petitions, and we issue a writ of mandamus, directing the Board of State Canvassers to certify plaintiff's petition as sufficient.

II. STANDARD OF REVIEW

We review for an abuse of discretion a court's decision to issue or deny a writ of mandamus.[8] This dispute also involves a question of statutory interpretation, which we review de novo.[9] "[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature."[10] The words of the statute are the most reliable evidence of the Legislature's intent and we must give each word its plain and ordinary meaning.[11] "In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' "[12]

III. ANALYSIS

This appeal concerns a big constitutional issue, even though its focus is something as small as $^{14}/_{72}$ of an

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[7] *Stand Up For Democracy v Secretary of State*, 491 Mich 950 (2012).

[8] *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005).

[9] *People v Kolanek*, 491 Mich 382, 393; 817 NW2d 528 (2012).

[10] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[11] *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011).

[12] *Sun Valley Foods Co*, 460 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

inch. This matter turns on what many citizens may regard as a trivial issue: Whether a heading on a petition signed by over 200,000 people satisfies the statutory requirement that the petition heading be in "14-point boldfaced type[.]"[13] As technical as this appears, the rule of law is implicated here because this issue concerns the constitutional foundation of how we govern ourselves.

Although we colloquially call ourselves a "democracy," we are not. We are a constitutional *republic* in which we, as Michigan citizens, elect our representatives to local and state legislative bodies to enact our laws. This republican form of government is guaranteed to us in the United States Constitution.[14]

In Michigan, we have enacted into our State Constitution an exception: The right of the people by initiative or referendum *directly* to enact laws or to repeal those validly enacted by our Legislature.[15] Thus, as plaintiff seeks here, it is possible for a small minority of citizens to suspend a validly enacted law and require that that law be voted on in a general election. This case well demonstrates that tension between constitutional interests: the right to a republican form of government versus a constitutional process that allows a small minority to suspend the enactments of that government.

In the very constitutional provision creating this right of petition by initiative and referendum, the Legislature is required to prescribe the rules by which

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[13] MCL 168.482(2).

[14] Article IV, § 4 of the United States Constitution states: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

[15] Const 1963, art 2, § 9.

such petitions may validly be made.[16] It has done so, and one such provision is the mandatory 14-point-boldfaced-type requirement that is challenged here.[17] No doubt in most ordinary circumstances whether a heading is in 14-point or 12-point type would be an inconsequential issue. But, because the power of referendum affects duly enacted laws, these so-called "trivial" requirements protect the citizens of Michigan from having their laws suspended by small factions—*unless the petitioners satisfy all the requirements for invoking a referendum*.[18] With these principles in mind, we turn to the statutory requirement that the petition heading "shall be . . . printed in capital letters in 14-point boldfaced type[.]"[19]

A. SUBSTANTIAL COMPLIANCE

Plaintiff first suggests that the statutory scheme allows for certification of a referendum petition if that petition substantially complies with MCL 168.482.[20]

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[16] Const 1963, art 2, § 9 ("The power of referendum . . . must be invoked in the manner prescribed by law . . . .").

[17] MCL 168.482(2).

[18] See *Thompson v Secretary of State*, 192 Mich 512, 522-523; 159 NW 65 (1916).

[19] MCL 168.482(2).

[20] The partial dissent of Justices CAVANAGH, MARILYN KELLY, and HATHAWAY claims that it is "unnecessary," *post* at 634, to rule on the issue of substantial compliance. However, the Court of Appeals treated this case as one involving substantial compliance and analyzed the doctrine in detail. Indeed, the basis for the Court of Appeals' grant of mandamus was its conclusion that plaintiff had substantially complied with the type-size requirement of MCL 168.482(2). This Court, therefore, has the responsibility to obviate any doctrinal confusion regarding substantial compliance before analyzing the Court of Appeals' ruling. Thus, the justices concluding that substantial compliance is insufficient are not reaching an "unnecessary" issue, but are instead correcting an error of law that pervaded the Court of Appeals' decision and was essential to its ruling.

The applicable statutory provision, MCL 168.482(2) provides:

> If the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum of legislation, the heading of each part of the petition *shall be* prepared in the following form and printed in capital letters in *14-point boldfaced type*:
>
> * * *
>
> REFERENDUM OF LEGISLATION
> PROPOSED BY INITIATIVE PETITION[21]

The Legislature's use of the term "shall" " 'indicates a mandatory and imperative directive.' "[22] Nowhere does the language of this provision indicate that compliance with the 14-point-type requirement may be achieved despite deficiencies. Indeed, other provisions of the Michigan Election Law, MCL 168.1 *et seq*., demonstrate that the Legislature knows how to construct language specifically permitting substantial compliance with regard to form and content requirements.[23] Similar lan-

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[21] Emphasis added.

[22] *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011), quoting *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005).

[23] See MCL 168.303(2) (the "nominating petition shall be substantially in the form prescribed in section 544c"); MCL 168.546 ("nominating petitions . . . must comply substantially with the above form"); MCL 168.590a(1) (a "qualifying petition shall be . . . in substantially the same form as provided in section 590h"); MCL 168.590h(2) ("the qualifying petition form shall be substantially as set forth in section 544c"); MCL 168.653a(1) ("notice [of a special election] shall be in substantially the following form"); MCL 168.685(3) ("[new political party] petitions shall be in substantially the following form"); MCL 168.697 (the "names of the several offices to be voted for shall be placed on the ballot substantially in the following order"); MCL 168.759(5) (an "absent voter ballot application shall be in substantially the following form"); MCL 168.761(4) (the "clerk shall enclose with the ballot . . . a printed statement in substan-

guage is conspicuously absent from MCL 168.482(2) and demonstrates a clear intent that petitions for referendums, voter initiatives, and constitutional amendments strictly comply with the form and content requirements of the statute. This conclusion is further supported by the Legislature's 1965 amendment of MCL 168.482, which omitted language that specifically permitted substantial compliance but retained the mandatory requirement that the petition heading be in 14-point type.[24] Indeed, the use of the mandatory term "shall" in MCL 168.482(2), in the absence of any language indicating that substantial compliance with the statute's requirements suffices, indicates a clear intent that such a petition must strictly comply with the type requirement. Consequently, substantial compliance with MCL 168.482(2) is not permitted. To certify a petition that does not strictly comply with the requirements of MCL 168.482 on the basis that it substantially complied with the statutory requirements would defeat the Legislature's intent. However, "our judicial role precludes [us from] imposing different policy choices than those selected by the Legislature"; rather, we must apply the terms as written.[25]

Plaintiff, however, also relies on MCL 168.544d, which provides that petitions circulated countywide "shall be substantially as provided in [MCL 168.482] . . . ." Plaintiff asserts that this provision adopts the substantial compli-

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tially the following form"); MCL 168.952a ("A person may print his or her own recall petitions if those petitions comply substantially with the form prescribed by the secretary of state and the requirements of section 544c(2).").

[24] Compare MCL 168.482, as amended by 1954 PA 116 (which included the phrase "type of the approximate size set forth"), with MCL 168.482, as amended by 1965 PA 312 (which omitted that phrase).

[25] *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999) (quotation marks and citation omitted).

ance doctrine and permits certification of nonconforming referendum petitions. Because plaintiff circulated its petition countywide, MCL 168.544d is applicable. That provision provides:

> Nominating petitions for the offices under this act and petitions for a constitutional amendment, initiation of legislation, or referendum of legislation or a local proposal may be circulated on a countywide form. *Petitions circulated countywide shall be on a form prescribed by the secretary of state, which form shall be substantially as provided in sections 482*, 544a, or 544c, whichever is applicable. The secretary of state may provide for a petition form larger than 8-1/2 inches by 13 inches and shall provide for identification of the city or township in which the person signing the petition is registered. The certificate of the circulator may be on the reverse side of the petition. This section does not prohibit the circulation of petitions on another form prescribed by this act.

By its plain language, this provision permits the *Secretary of State* to prescribe a form that itself "substantially" complies with the requirements of MCL 168.482. Thus, to the extent that MCL 168.544d permits substantial compliance, it only permits the Secretary of State to prescribe petition requirements that are in substantial compliance with MCL 168.482, MCL 168.544a, or MCL 168.544c of the Michigan Election Law. Contrary to plaintiff's contention, the statute does not allow a petitioner itself to determine what substantially complies with the applicable election law requirements. The Legislature only provided the Secretary of State with that discretion.

More significantly, the Secretary of State's prescribed form, as permitted by MCL 168.544d, mandates strict compliance with the Legislature's mandate in MCL 168.482(2) that the heading of a referendum petition be

printed in 14-point type.[26] Accordingly, MCL 168.544d does not constitute a broad substantial compliance provision, as plaintiff would have us interpret it. Because the Secretary of State's prescribed form mandates strict compliance with MCL 168.482(2), plaintiff's reliance on MCL 168.544d is unavailing.

In the absence of statutory language supporting the substantial compliance doctrine, plaintiff nevertheless posits that Michigan caselaw provides a general substantial compliance exception to the mandatory requirements of the Michigan Election Law. Plaintiff principally relies on *Bloomfield Charter Twp* for the proposition that Michigan courts have allowed issues to be placed on the ballot despite the existence of technical deficiencies in form and content. Although a lineage of Michigan Court of Appeals cases exists applying the substantial compliance doctrine before an election, we are unwilling to follow this line of cases and adopt a general substantial compliance exception because such a rule is inconsistent with the statutory scheme as well as our jurisprudence.[27]

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[26] See Memorandum from the Secretary of State, Initiative and Referendum Petitions — Prescribed Format (Revised June 2011). The Secretary of State's prescribed format requires that a referendum petition's heading "shall be printed in capital letters in 14-point boldface type on the left margin of the signature side of the sheet or at the top of the signature side of the sheet." *Id*. Clearly, the Secretary of State has not relaxed the type-size requirement of MCL 168.482(2).

[27] Notably, our caselaw has consistently recognized the availability of substantial compliance if a petition is challenged in the post-election context. See footnote 33 of this opinion. Court of Appeals jurisprudence, however, has ignored the significance of the distinction between pre-election and post-election petition challenge cases. For example, in *Settles v Detroit City Clerk*, 169 Mich App 797; 427 NW2d 188 (1988), a pre-election challenge to an initiative petition in a home rule city, the Court cited post-election caselaw to hold that "all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements in petitions . . . are resolved in favor of permitting the

In *Bloomfield Charter Twp*,[28] a group of developers filed annexation petitions with the county clerk, who certified the petitions and scheduled a referendum election regarding annexation. The township sought to enjoin the election and also alleged, in part, that the annexation petitions failed to comply with MCL 168.488, which requires that annexation petitions meet the requirements of MCL 168.482(1) and (4) through (6). The circuit court denied the township's request for injunctive relief and concluded that certification of the petitions was proper because " 'any technical deficiencies in the petitions are not material . . . .' "[29] Approximately a year later, after voters had approved the annexation, the Court of Appeals affirmed the circuit court's ruling. The Court acknowledged that the annexation petitions were technically deficient under the statute, and reasoned that it would apply "the doctrine [of substantial compliance] in this case involving imperfect petitions, absent the Legislature's instruction that a petitioned-for election will be precluded unless the initiating petitions exactly match the Michigan Election Law requirements for form and content."[30] The Court, therefore, affirmed the circuit court and concluded that it had properly found substantial compliance and had correctly refused to permit the minor defects to preclude the election.[31]

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people to vote and express a choice on any proposal subject to election." *Id.* at 802-803, citing *Meridian Charter Twp v East Lansing*, 101 Mich App 805; 300 NW2d 703 (1980). Likewise in *Bloomfield Charter Twp*, technically a post-election case, the Court cited cases involving both pre- and post-election challenges for the same proposition, citing both *Meridian Charter Twp* and *Settles*.

[28] *Bloomfield Charter Twp*, 253 Mich App 1.

[29] *Id*. at 18.

[30] *Id*. at 23.

[31] *Id*. at 25.

Bloomfield Charter Twp is overruled to the extent that it stands for the proposition that substantial compliance with mandatory petition requirements compels the pre-election certification of a technically deficient petition. Clearly, *Bloomfield Charter Twp*'s reasoning is contrary to the plain language of MCL 168.482(2), which we have explained contains a mandatory 14-point-type requirement. A nonconforming referendum petition cannot be certified for inclusion on the ballot because that result is contrary to the Legislature's intent that petitions strictly conform to the requirements of MCL 168.482. Simply because the Legislature has not included an explicit instruction that "a technically imperfect petition necessarily precludes an election regarding the matter therein addressed," does not mean that the Legislature intended inclusion of deficient petitions as *Bloomfield Charter Twp* reasoned.[32] *Bloomfield Charter Twp* inferred too much from the legislative silence and effectively ignored the mandatory language that the Legislature chose to use when stating the form and content requirements of MCL 168.482.

Moreover, while this Court has recognized application of the substantial compliance doctrine to mandatory petition requirements *post*-election,[33] it has not recently sanctioned application of substantial compli-

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[32] *Id.* at 22.

[33] It has long been held that post-election challenges substantially relax technical requirements on the grounds that any technical deficiencies are cured by the voters' affirmative approval of the underlying proposal. See *Carman v Secretary of State*, 384 Mich 443, 454-455; 185 NW2d 1 (1971) (reasoning that the error in noncompliant initiatory petitions was cured by voters' adoption of the constitutional amendment because they were "directly notified" of the omitted information on election day); *City of Jackson v Commissioner of Revenue*, 316 Mich 694, 716-718; 26 NW2d 569 (1947) (noting that courts should view technical errors differently once the electors have voted affirmatively).

ance to nonconforming petitions before an election. The only Michigan Supreme Court case to apply the substantial compliance doctrine pre-election is *Kadans v Wayne County Clerk*.[34] In that case, the plaintiff sought a writ of mandamus compelling the defendant to certify his nonconforming nominating petitions. Fifty-eight of the plaintiff's fifty-nine petitions were not $8\frac{1}{2}$ by 13 inches as required by former MCL 168.544, but were $2\frac{1}{2}$ to 3 inches shorter than 13 inches because they were missing the circulator's affidavit. This Court unanimously found that former MCL 168.544 had "been complied with by plaintiff according to the rule of 'substantial compliance' " and that the plaintiff was entitled to the writ of mandamus.[35]

Kadans's broad application of the substantial compliance standard, however, was repudiated by the Legislature's subsequent adoption of MCL 168.544d.[36] Before adoption of that provision, the law was silent with respect to agency-created or agency-prescribed petitions. The adoption of MCL 168.544d now provides clear guidance concerning when substantial compliance is allowed with regard to agency-created or agency-prescribed petitions and essentially delegates to the Secretary of State the ability (through its prescribed petitions) to determine what requirements must be fully complied with and what requirements need be only substantially complied with. Consequently, the only case from this Court applying a general substantial compliance exception to mandatory petition requirements of the Michigan Election Law has been superseded by statute.

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[34] *Kadans v Wayne Co Clerk*, 363 Mich 306; 109 NW2d 788 (1961).

[35] *Id*. at 308.

[36] 1975 PA 327.

In sum, neither the statutory scheme nor the caselaw plaintiff relies on supports application of the substantial compliance doctrine in the period before an election. Rather, for substantial compliance to be sufficient before an election, its use must be rooted in a particular statutory exception to the statutory formatting and content requirements. Because no statutory provision permitting application of substantial compliance exists in the instant case, and because intervenor has raised a pre-election challenge, plaintiff must have actually complied with the requirements of MCL 168.482(2) in order for its referendum petition to be certified.[37]

B. ACTUAL COMPLIANCE

1. TYPE-SIZE REQUIREMENT OF MCL 168.482(2)

To determine whether plaintiff has actually complied with MCL 168.482(2), we must first determine the meaning of the phrase "printed in capital letters in 14-point boldfaced type[.]" The Michigan Election Law does not define the terms "point" and "type," but the parties agree that the traditional definitions of "point" and "type" have not substantially changed since the enactment of the statute in 1954. We agree with the traditional definitions proposed because they are con-

[37] The partial dissent of Justices CAVANAGH, MARILYN KELLY, and HATHAWAY asserts that "there are four votes that find at least substantial compliance . . . ." *Post* at 634. This assertion is simply untrue. Rather, there are four votes for the elimination of the judicial expansion of the substantial compliance doctrine, and the partial dissent has refused to recognize that we have now eliminated this judicially created doctrine. Accordingly, when a petition is challenged pre-election, the petition must actually comply with the statutory mandates of MCL 168.482(2), or the petition must substantially comply pursuant to a specific statutory exception or through a form prescribed by the Secretary of State. Neither of the latter two circumstances exists in this case.

sistent with those terms' acquired technical meanings[38] and those definitions have remained constant up to the present day. "Point" is defined as "a unit that is used to measure the size of type used in printing and that is equivalent to about 1/72 inch[.]"[39] "Type" is defined as "[a] rectangular block, usually of metal or wood, having its face so shaped as to produce, in printing, a letter, figure, or other character[.]"[40] Multiple dictionary depictions of type show that the character, or typeface, does not cover the entire surface of the type, but rather

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[38] MCL 8.3a.

[39] *Webster's Third New International Dictionary of the English Language, Unabridged Edition* (1965), p 1750. The definition of "point system" before the enactment of the statute refers to substantially the same unit of measurement used to measure type. See *Webster's New International Dictionary of the English Language, Second Edition Unabridged* (1948), p 1904 ("A system according to which the various sizes of type bodies, leads, etc., bear a fixed and simple relation to one another. The point system now in general use in America was adopted in 1886 by the United States Type Founders' Association, though many founders were already using it. It is a modification of a French system, and is based upon the pica body then most used. This body is divided into twelfths, called "points," and every type body consists of a given number of these points; as, the body of this book is printed in 6-*point*. The value of the point is .013837 inch, or nearly 1/72 inch. For specimens of sizes, see TYPE.").

[40] *Webster's New International Dictionary of the English Language, Second Edition Unabridged* (1948), p 2750. "Type" is also defined as "Such blocks, or the letters or characters impressed, collectively." *Id*. Notably, Justice MARKMAN prefers this definition, but he does not faithfully adhere to it because he omits the definition's reference to "blocks." Further, despite the parties' agreement regarding the technical meanings of these terms, Justice MARKMAN nonetheless asserts that because other methods of printing were available in 1954, that it is more reasonable to interpret "type" as the text or type produced. We reject Justice MARKMAN's preferred definition of "type" based on the availability of other printing methods for the well-explained reasons articulated by Chief Justice YOUNG. These other printing methods are simply irrelevant because to ascertain the Legislature's intent we must focus on the language used, not extraneous then-available printing methods. Indeed, the meanings of "point" and "type" were well established in 1954, and had the

includes spacing above or below the letters, to prevent the printed characters from touching.[41] These depictions further demonstrate that the point size of type measures the entire vertical face of the metal block. The significance of these definitions is that the character printed is smaller than the point size of the type.[42]

The parties' views diverge, however, with respect to whether the phrase "printed in capital letters in 14-point boldfaced type" requires measurement of the "letters" or of the "type." Intervenor, like the Court of Appeals, interprets the phrase to require that the "letters" measure 14 points. We disagree with this interpretation and conclude that the *type* must measure 14 points, not the resulting printed letters. This is because the technical definition of "point" specifically denotes that point measures type size, which is the entire vertical length of the printer's block. As explained, the technical meanings of "point" and "type" necessarily incorporate some amount of blank space so that the capital letters in 14-point type do not necessarily measure $^{14}/_{72}$ of an inch.

Legislature intended some other unit of measurement to take account of these other printing methods, the Legislature could have said so, but it did not.

[41] See *Webster's Third New International Dictionary of the English Language, Unabridged Edition* (1965), p 2476 (diagram of "type"); *Webster's New International Dictionary of the English Language, Second Edition Unabridged* (1948), p 2750 (diagram of "type").

[42] Furthermore, the definition of "point" refers to "type used in printing," *Webster's Third New International Dictionary of the English Language, Unabridged Edition* (1965), p 1750, and the definition of "point system" refers to the "sizes of type bodies," *Webster's New International Dictionary of the English Language, Second Edition Unabridged* (1948), p 1904. These references to "type" within the definition of "point" further support the conclusion that, whether the "type" refers to the printer's blocks themselves, or whether it refers to the alternative definition of the resulting printed letters, the point measurement of type exists by reference to the actual printer's blocks, contrary to Justice MARKMAN's claim.

Intervenor claims that because "in" means "made of," the letters must measure 14 points. However, this argument is specious. The term "14-point" specifically modifies the word "type," and there is no indication that the Legislature intended to diverge from the technical meanings of the terms "point" and "type." Had the Legislature intended that the physical height of the letters measure 14 points, it would not have used the term "type" as modified by "14-point" and instead could have specified that the letters must "measure 14 points."[43]

Furthermore, intervenor's argument does not take into account the remaining subsections within MCL 168.482, which provide additional support for our conclusion. Subsection (3) states, "The full text of the amendment so proposed shall follow and be printed in 8-point type," while subsection (5) states, "The following warning shall be printed in 12-point type . . . ." Reading these subsections together with subsection (2), and consistently as a whole as we must,[44] it is clear that

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[43] Having considered this textual argument, which is substantially the same as that offered by Justice MARKMAN, his contention that we have not considered this language is clearly incorrect. Rather, it is Justice MARKMAN who has failed to consider the phrase, "printed in capital letters in 14-point boldfaced type," in the context of the entire section as we explain in footnote 44 of this opinion.

[44] "[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole." *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008) (quotation marks and citation omitted). Yet, Justice MARKMAN, like intervenor, reads MCL 168.482(2) in isolation to conclude that "type" must refer to the point size of the letters. Were we to adopt intervenor's and Justice MARKMAN's position, we would essentially adopt two different definitions of type, requiring petitioners to measure the letters under MCL 168.482(2), but measure the type under MCL 168.482(3) and (5). Indeed, Justice MARKMAN does not explain how to reconcile the language of MCL 168.483(2) with that used in subsections (3) and (5). Instead, he posits that the language of MCL 168.482(2), specifically the terms "printed" and "letters," and "in" instead of "with," evince a clear intent that the letters

the point size of all the required text refers to the size of the type and not the individual letters. The fact that the other content requirements are not required to be in capital letters, but a combination of uppercase and lowercase letters, necessarily contemplates that letters in the required type size may have different heights, since a lowercase "x" has a different height than an uppercase "E." This provides further support for the conclusion that the "type," and not each individual "letter," must be measured. Otherwise, if intervenor's position were adopted, each of the letters in subsections (3) and (5) would have to be of equal physical size, contrary to the Legislature's clear indication in subsections (3) and (5) that the required text appear in both uppercase and lowercase letters. Given the foregoing, it is clear that the reference to "letters" in MCL 168.482(2) is intended merely to clarify that the text of the heading appear in all capital letters.[45] We would therefore hold that MCL 168.482(2), by its plain terms, requires that the *type* of the petition heading measure 14 points, not the individual letters.

2. MEASUREMENT OF DIGITAL TYPE

Having concluded that the "type" of the petition heading and not the letters must measure 14-points, does not end the analysis. Rather, it must be deter-

measure 14 points and not the type. This view is unpersuasive for reasons I, and Chief Justice YOUNG, have explained in detail.

[45] We disagree with intervenor's and Justice MARKMAN's suggestion that the letter must be measured because otherwise, an illegible 3-point letter in 14-point type would comply with the statute. Intervenor, like Justice MARKMAN, thus asserts that measurement of the type would defeat the purpose of MCL 168.482(2). This situation is not before this Court. Moreover, simply because the size of letters could be manipulated within a 14-point-type setting does not mean that the Legislature intended that the heading's letters each measure 14 points.

mined whether plaintiff's petition heading measures 14-point type. This question necessarily involves the preliminary issues whether the traditional meanings of "point" and "type" are transferrable to digital text and, if so, how digital 14-point type is to be measured.

While plaintiff and intervenor disagree on these points, the assistant attorneys general representing the Board of State Canvassers and the Secretary of State conceded at oral argument and in their supplemental brief concerning intervenor's application for leave to appeal in this Court, that those "same [traditional] concepts [of point and type] are replicated in computer software programs that result in the production of digital type from an electronic printer."[46] Counsel for the board and the Secretary of State has also conceded that the same methods of measurement applicable to metal blocks of type are applicable to digital type.[47]

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[46] At oral argument, the assistant attorney general representing the board and the Secretary of State stated, "[E]ssentially software of the digital age is intended to replicate what was done in the past."

Further, although this Court construes the statutory language "in the light of the circumstances existing at the date of [the statute's] enactment, not in the light of subsequent developments" *Wayne Co Bd of Rd Comm'rs v Wayne Co Clerk*, 293 Mich 229, 235-236; 291 NW 879 (1940), I view the Legislature's decision not to amend these technical terms, despite several amendments in the digital age, see 1993 PA 137 and 1998 PA 142, as an acknowledgement that the meaning of those terms has carried over to computerized printing.

[47] With regard to the measurement of type, the assistant attorney general at oral argument answered, "That's my understanding," in response to Chief Justice YOUNG's inquiry whether "even though we now have a different method of producing type, . . . has that measurement [from the traditional printing industry] been faithfully transcribed into digitized forms of type?" Curiously, neither Chief Justice YOUNG nor Justice MARKMAN attaches any significance to defendants' concessions, despite the fact that the Board of State Canvassers and the Secretary of State are charged with implementing Michigan's election laws, including the

Further, because this Court can take judicial notice of facts not subject to reasonable dispute,[48] I acknowledge that Microsoft's glossary of typographical terms defines "point" consistently with that term's traditional meaning, as "[a] unit of measurement, often used to measure type size, equal to 0.013837 inch (approximately equal to 1/72 [inch])."[49] And although Microsoft's glossary does not include the definition of "type," it defines "font size" as the "size of type . . . ."[50] A separate Microsoft

approval or denial of referendum petitions and are, thus, in the best position to provide expertise regarding the proper measurement of digital text.

[48] *People v Goecke*, 457 Mich 442, 448 n 2; 579 NW2d 868 (1998) (noting that this Court may take judicial notice of facts not subject to reasonable dispute); MRE 201.

[49] Microsoft Support, *WD2000: Definitions of Typography Terms in Word* <http://support.microsoft.com/kb/192973/en-us> (accessed August 1, 2012).

[50] *Id*. Chief Justice YOUNG asserts that judicial notice cannot be taken of how Microsoft "programmed its font system . . . ." *Post* at 630 n 13. Yet, I have not taken judicial notice of such facts and have only taken judicial notice of terms specifically defined by Microsoft. That Microsoft has adopted certain definitions of "point," and "font size," and acknowledged that the point size of "type" measures not the letter but the digital block, is hardly subject to dispute. I fail to see how my acknowledgment of Microsoft's definitions of these terms, made known to the public, is any different from this Court's decisions to take judicial notice of economic conditions, *In re Baldwin's Estate*, 311 Mich 288, 312; 18 NW2d 827 (1945), common human behaviors, *Moore v Capital Nat'l Bank of Lansing*, 274 Mich 56, 66-67; 264 NW 288 (1936), or an agency's decision to change an historical practice, *Grandville Muni Executive Ass'n v City of Grandville*, 453 Mich 428, 442; 553 NW2d 917 (1996), or, indeed, this Court's common practice of relying on dictionary definitions when interpreting a statute.

Justice MARKMAN also attempts to discredit my use of judicial notice, asserting that I have assumed that Microsoft defines type as font size. His assertion that there is "no evidence" to reach this conclusion, *post* at 646, is unfounded because, as I explain, Microsoft has specifically acknowledged that the size of type incorporates additional space not covered by the font, or actual letter.

webpage further indicates that, when measuring the point size of type, the letter does not cover the entire "block" because "a little bit [is] added on . . . so that lines of type 'set solid' (without any additional space between them) do not bash into each other."[51]

Given the concessions made by counsel for the board and the Secretary of State's and Microsoft's definitions of point and type, it is clear that digital type is the equivalent of physical type and that computer software continues to use this basic terminology.[52] Further, because digital type and physical type are functional equivalents, they are measured in the same manner except in the instance of digital type; in that instance an invisible box, which replicates the printer's block, is measured and is reflected by the font size selected.[53]

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[51] Microsoft, *The Relationship Between Font Size and Physical Type Size* <http://www.microsoft.com/typography/web/designer/face3.htm> (accessed August 1, 2012). Consistently with Microsoft's recognition that digitized type is larger than the actual character, other modern typographical sources recognize that computer characters are contained within an invisible box, or blocking around the letter, which replicates the metal block used in mechanical typesetting. See Ambrose & Harris, *The Fundamentals of Typography* (2d ed) (Lausanne: AVA Publishing SA, 2011), p 46; Bringhurst, *The Elements of Typographic Style* (Vancouver: Hartley & Marks, 1992), p 289. Notably, just like the characters on physical type, the digital characters within digital type will take up different amounts of space within the type depending on the font family. See Craig, Scala, & Bevington, *Designing with Type: The Essential Guide to Typography* (5th ed) (New York: Watson-Guptill Publications, 2006), pp 17-18. This is why different fonts of different point, or font size, appear smaller or larger in comparison to one another. This is yet another reason why measurement of the digital letter will yield an inaccurate type size.

[52] Aside from the concessions and Microsoft's definitions, multiple modern typographical sources also support this conclusion. Ambrose, *The Fundamentals of Typography*, p 46; Craig, *Designing with Type*, pp 17-18.

[53] This conclusion is implicit in Microsoft's adoption of the technical term "point" and its acknowledgment that digital type is the equivalent of metal type. Adobe also acknowledges that measurement for metal type

3. APPLICATION

In the present case, plaintiff used 14-point Calibri font for its petition heading, as attested to by plaintiff's printer. Although plaintiff's printer's affidavit did not state the basis for this conclusion, the affiant explained at the Board of State Canvassers hearing how he verified the point size:

> When I was asked to sign the affidavit, I took the file that we were given, that we had assembled for printing purposes, and I used a program . . . called PDF Suite. And I went in and I verified that it was 14-point . . . .

Intervenor filed two competing affidavits, but did not present any expert testimony at the hearing. Both affiants measured the size of the petition heading's capital letters and each concluded that the heading is in "a significantly smaller font than required" without providing a basis for this conclusion. I do not view these affidavits as dispositive because, as I have already concluded, measuring the letters to determine compliance with MCL 168.482(2) is an inappropriate method of measurement.

I also do not view as dispositive the intervenor's supplemental affidavit submitted after we granted oral argument on the application.[54] In this affidavit, the affiant attested that, using an E-scale ruler,[55] the type of

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is used for the measurement of digital type. Adobe, *Measuring Type* <http://www.adobe.com/type/topics/info2.html> (accessed August 1, 2012).

[54] After intervenor moved for leave to appeal and we granted argument on the application, this Court granted intervenor's motion to supplement the record. *Stand Up For Democracy v Secretary of State*, 817 NW2d 50 (Mich, 2012).

[55] An E-scale ruler reprints various letters "E" of the same font family that comprise different type sizes to provide a side-by-side comparison between the example type size and the printed letter.

the petition heading did not measure 14 points, and that while the E-scale ruler "subtract[s] the space above or below the actual letter," the E-scale ruler only reflects how characters of a particular font in 14-point type will appear. Because different fonts take up different amounts of space within the digital block, an E-scale ruler cannot definitively measure whether the actual font selected is in 14-point type.

I also find the affiant's comparison of plaintiff's heading with 14-point type metal blocks that were available in 1954 to be unpersuasive. The affiant avers that this comparison shows that plaintiff's heading is "clearly a smaller type size," yet the spacing between the lines of text in each of the three examples appears to be the same. This exercise only demonstrates what we already know: Different styles of font will take up different amounts of space on a printer's metal or digital block. In fact, plaintiff's expert testified with regard to this very fact at the hearing:

> Basically when you're talking about 14-point type, you're talking about an area that's just less than a fifth of an inch, .194. And it becomes a canvas that a type designer gets to work with, and sometimes they use the whole canvas and sometimes they use part of the canvas.

Consequently, the affiant's comparison does not establish that plaintiff's heading is noncompliant. Rather, because the spacing between the lines of each example of text appears to be equal, the comparison tends to demonstrate actual compliance with the 14-point-type requirement.

My review of intervenor's evidence shows that intervenor failed to establish that plaintiff's petition's heading was not in 14-point type and otherwise failed to create a legitimate question of fact regarding the type size used. Plaintiff's evidence established that its

printer used a 14-point Calibri font, which the printer verified using Adobe software, and which intervenor simply failed to rebut. Because Microsoft defines font size to equal type size, plaintiff presented evidence establishing that it actually complied with the type-size requirement of MCL 168.482(2). There being no evidence to the contrary, I conclude that plaintiff actually complied with MCL 168.482(2).

C. MANDAMUS

We must next determine whether plaintiff is entitled to a writ of mandamus requiring certification of the referendum petition. Mandamus is an extraordinary remedy and the primary purpose of a writ of mandamus is to enforce duties required by law.[56] To obtain a writ of mandamus the plaintiff must show that it has a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform the act.[57]

The board's duty with respect to referendum petitions is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification.[58] In this case, there is no question that plaintiff collected more than enough valid signatures in support of its petition. However, because the board deadlocked on the issue of compliance with the type-size requirement of MCL 168.482(2), the board did not certify the petition. Because plaintiff's petition actually complied with the type-size requirements of MCL 168.482(2), the board is

[56] *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 666-667; 425 NW2d 80 (1988).

[57] *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999).

[58] See MCL 168.476 and MCL 168.477.

obligated to certify the petition. Accordingly, I conclude that plaintiff is entitled to a writ of mandamus because the board has a clear legal duty to certify the petition as actually compliant with MCL 168.482(2).

IV. CONCLUSION

A majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for pre-election certification and we overrule *Bloomfield Twp*. I and two other justices further conclude that the type-size requirement of MCL 168.482(2) requires that the "type," not the "letters," of the petition heading measure 14 points. I additionally conclude that plaintiff actually complied with the type-size requirement. Finally, a majority of this Court holds that plaintiff is entitled to a new writ of mandamus requiring the Board of State Canvassers to certify its petition as sufficient. Accordingly, a majority of this Court directs the Board of State Canvassers to certify plaintiff's petition for the ballot and, pursuant to MCR 7.317(C)(3), we direct the Clerk of the Court to issue the judgment order forthwith.

SUMMARY

(1) A majority of this Court holds that the Court of Appeals erred by granting mandamus on the basis of plaintiff's substantial compliance with election law. The Court of Appeals opinion and grant of mandamus are reversed. Substantial compliance with the requirements of MCL 168.482(2) is insufficient to establish that plaintiff's referendum petition is entitled to be placed on the ballot. Entitlement to be placed on the ballot requires a showing of actual compliance with the law.

(2) The Board of State Canvassers shall certify the petition as sufficient because a majority of the Court concludes that plaintiff either actually complied with the law or that the Court of Appeals' original writ of mandamus was not erroneous. Accordingly, a new writ of mandamus shall enter.

YOUNG, C.J. (*concurring in part and dissenting in part*). We concur with and join parts I, II, III(A), and III(B)(1) of Justice MARY BETH KELLY's opinion. We agree with Justices MARY BETH KELLY and MARKMAN that *actual compliance* with the statutory type requirements is mandated. In determining how to measure the type size, we believe that the technical (namely, the customary printer's) understanding of the statutory terms "type" and "point" negate the intervernor's notion that one can determine the size of "type" by measuring the characters actually printed. Consequently, the question we must resolve is whether the "size 14" Calibri font generated by plaintiff's computer is a faithful replication of the statutorily required heading in 14-point type that would have been generated by using traditional movable type.

On this question, Justice MARY BETH KELLY believes that it is possible on this record, and with reference to extrarecord materials, both to determine how a digitized computer font is produced and that the font at issue here meets the statutory size requirement. She does so by invoking judicial notice. We do not share Justice MARY BETH KELLY's technical literacy: we lack the necessary knowledge of printing and, more important, the programming necessary to create computer fonts. Therefore, we respectfully dissent from her conclusion that plaintiff actually complied with the type size requirements in MCL 168.482(2).

As a result, we conclude that plaintiff failed to establish that its petition heading met the statutory type and print requirements. Because of this failure of proofs, we would deny plaintiff's claim for mandamus, thus reversing the Court of Appeals' decision on the merits. However, given the stunning transformation of the printing industry since the statutory requirements were enacted—from movable type to computer generated print—and because we believe that the historical statutory terms are nonetheless applicable in this new computer era, it is important for this Court to establish a precedent to guide future petition efforts. While we reject her conclusion that actual compliance has been proved here, we believe that Justice MARY BETH KELLY's opinion has provided this guidance on the controlling legal principles.

Important to our resolution of this case, however, is the fact that the legal standards under which the Secretary of State, the Board of State Canvassers, and the parties operated were confused and, as held today, erroneous. As a consequence, we would allow plaintiff an opportunity to present proofs to the Board of State Canvassers under the announced correct legal standards. Accordingly, we would remand this case to the Board of State Canvassers for further proceedings to determine whether plaintiff's petition heading actually complied with the type size requirements of MCL 168.482(2).

As eloquently stated by Justice MARY BETH KELLY, this appeal concerns a big constitutional issue about an apparently small thing: the size of a heading required for circulated petitions like the one at issue here. And although a "technical" requirement—the size of a petition heading—is involved, this is a legally and constitutionally significant matter because compliance with the

legal petition requirements is the only means by which a small fraction of Michigan citizens is permitted to countermand the will of the people as expressed through the legislation duly enacted by their elected representatives.

So this case about a "technicality" is *not* about the wisdom of the act the plaintiff's petition seeks to suspend, nor is it about "the people's right to vote," as plaintiff characterizes the issue. The fact is, the people *have voted*: they elected the very Legislature and Governor who enacted the emergency financial manager act, 2011 PA 4, MCL 141.1501 *et seq*., that plaintiff challenges with its petition.

The sole question before us is whether plaintiff has filed a *qualifying*, legally compliant petition that permits it to both suspend this validly enacted law and require its members' fellow citizens to determine whether this law will remain on the books. As Justice MARY BETH KELLY explains, this is a core issue in a *constitutional republic* like ours.

I. ANALYSIS

A. THE JUDGE-MADE "SUBSTANTIAL COMPLIANCE" DOCTRINE, TO THE EXTENT THAT IT REMAINS VIABLE, IS SUPERSEDED HERE BY THE LEGISLATIVELY DEFINED SUBSTANTIAL COMPLIANCE PROVISION OF MCL 168.544d.

MCL 168.482(2) requires that the petition heading "shall be . . . printed in capital letters in 14-point boldfaced type[.]" A majority of the Court agrees that, for the reasons that Justice MARY BETH KELLY's and Justice MARKMAN's separate opinions explain, the judge-made doctrine of substantial compliance is insufficient to entitle plaintiff to certification of its petition. Because MCL 168.482(2) uses the mandatory language "shall" regarding the type size of the petition heading, plaintiff

must fully adhere to this provision unless another statutory provision specifically allows for substantial compliance. As Justices MARY BETH KELLY and MARKMAN correctly explain, there is no statutory provision that would allow the Board of State Canvassers to apply the doctrine of substantial compliance to plaintiff's petition in this case. In particular, MCL 168.544d incorporates a substantial compliance provision specifying that only the Secretary of State *may* prescribe forms that substantially comply with the statutory requirements for petitions.

In this case, the Secretary of State actually mandated compliance with the required statutory conditions,[1] and plaintiff cannot prevail on the ground that it "substantially complied" with the 14-point type requirement. Thus, unless plaintiff *actually* complied, there is no clear legal right to have its petition certified.

B. THE MANDATORY STATUTORY "POINT" SIZE REQUIREMENTS FOR "TYPE" REFER TO THE SIZE OF A TRADITIONAL MOVABLE *TYPE BLOCK*, NOT THE SIZE OF THE ACTUAL PRINTED CHARACTER ON THE PETITION.

We agree with Justice MARY BETH KELLY that the Court of Appeals panel erred to the extent that it concluded that the petition heading's *printed letters* themselves must measure 14 points in height. While the Court of Appeals panel correctly recognized that a point is a unit of measurement (approximating 1/72 of an

[1] The Secretary of State, in its advisory designed to provide guidance to citizens engaged in the petition process, cited MCL 168.482(2) and explained that the heading "shall be printed in capital letters in 14-point boldface type on the left margin of the signature side of the sheet or at the top of the signature side of the sheet." Secretary of State memorandum, Initiative and Referendum Petitions — Prescribed Format (revised June 2011). Of course, the Secretary of State has the authority to determine that "size 14," "size 12," or "size 8" computer fonts comply with the statutory type size requirements of MCL 168.482(2), (5), and (3), respectively.

inch), the definitions of "point" and "type" that predominated at the time the Legislature enacted MCL 168.482 belie the conclusion that the printed letters themselves must measure 14 points in height.

The Legislature enacted MCL 168.482 in 1954 and amended it in 1965 to provide that the heading "shall be . . . printed in capital letters in 14-point bold face type[.]"[2] In determining the meanings of "point" and "type," this Court must accord these terms their "peculiar and appropriate meaning[s]" at the time of enactment.[3]

Webster's New International Dictionary of the English Language, Second Edition Unabridged (1948) defines "type" as "[a] rectangular block, usually of metal or wood, having its face so shaped as to produce, in printing, a letter, figure, or other character" or, alternatively, as "[s]uch blocks, or the letters or characters impressed, collectively."[4] It defines "point system" specifically in relation to the blocks themselves: "A system according to which the various sizes of type bodies, leads, etc., bear a fixed and simple relation to one another. . . . The value of the point is .013837 inch, or nearly $1/72$ inch."[5]

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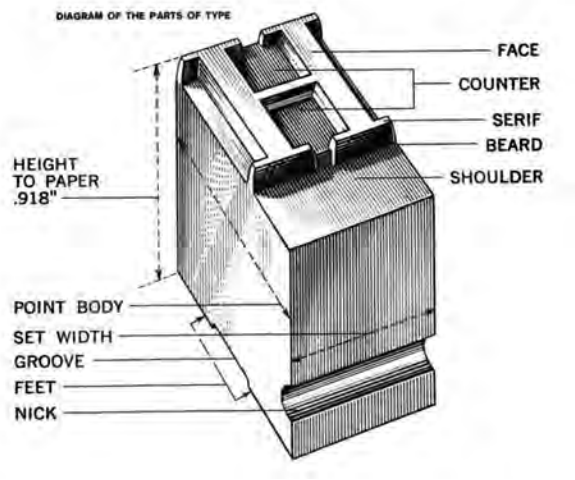
[2] 1954 PA 116; 1965 PA 312. 1993 PA 137 amended MCL 168.482 to divide it into subsections and substitute "boldface" for "bold face," while 1998 PA 142 substituted "boldfaced" for "boldface." Neither of these subsequent amendments altered the terms "point" or "type."

[3] MCL 8.3a.

[4] *Webster's New International Dictionary of the English Language, Second Edition Unabridged* (1948), def 17, p 2750. Similarly, *Webster's Third New International Dictionary of the English Language (Unabridged)* defines "type" as "a usu[ally] metal, wood, or plastic rectangular block having on its face a relief character of which an inked impression will produce a printed character" or, alternatively, as "a printed impression from type[.]" *Webster's Third New International Dictionary of the English Language (Unabridged)* (1966), defs 3a and 3f, p 2476.

[5] *Webster's New International Dictionary of the English Language, Second Edition Unabridged* (1948), def 3, p 1904.

Importantly, the dictionary contains a diagram of type that shows that the *type face*, or raised portion of the type block that actually imprints the ink onto the paper, is somewhat smaller than the size of the type block itself. The following diagram of a type block, taken from a 1963 treatise on typography, similarly shows how the *type face* does not extend to the entire space of the printer's block. Moreover, it shows that the *point body* of the type is measured by reference to the entire printer's block.[6]



This is consistent with the print literature dating back to the turn of the last century. An early twentieth century technical treatise on type explains:

> Only a few letters, like J and Q, cover nearly the entire surface on the end of the type; other letters, like B h l i,

[6] Rosen, *Type and Typography* (New York: Reinhold Publishing Corp, 1963), p 16, available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015047342434> (accessed August 2, 2012).

> cover the upper portion chiefly and leave a blank space at the bottom; while the small letters, like a e o u v, occupy only the middle portion of the surface; still others, like g y p, cover the middle and lower portions of the surface. As all these irregular shapes must be made to appear in line with each other, the type-body on which they are made is larger than the letter.[7]

Moreover, *Webster's Third New International Dictionary of the English Language (Unabridged)* defines "point" by referring to an illustration of "type" that refers to the block's "point size" as the entire length of the block, not just the raised portion that creates the printed character.

In short, there does not appear to be any dispute about the historical understanding of these technical printer's terms.[8] These dictionary definitions and tech-

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[7] Stewart, *Type* (Chicago: United Typothetae of America, 1918), pp 7-8.

[8] Justice MARKMAN argues that printers employed other methods of printing in 1954, when this statute was first enacted, and some of these methods did not use movable type. This is certainly a true statement, but it does not gainsay that the terms "point" and "type" were rooted in the movable type process and have well-known fixed meanings as we have explained.

Thus, Justice MARKMAN's examples of other alternative printing methods that did not require movable metal type blocks misses the point. Even if one of the rivals to letterpress printing methods were entirely divorced from the use of movable type, had it been used in a petition and challenged on the ground that it did not comply with the 14-point requirement, the same legal question raised here would have been presented: Did the alternative printing method satisfy the 14-point requirement as points were commonly understood in the printing industry?

Justice MARKMAN may find it hard to understand why the Legislature chose an indirect method of specifying the size of various print in petitions, but that is exactly what it did. And it did so by using technical terms of art in the printing field that have a longstanding and undisputed meaning. Justice MARKMAN chooses to rely on some of those definitional meanings, such as the fact that a "point" measures $1/72$ of an inch.

nical sources show unequivocally that, "although the body size of metal type is consistent, the printed letters themselves vary in size. Since no individual letter fills the entire body, you can see why merely measuring the printed letter will not reveal the point size."[9] Moreover,

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However, he jettisons others (the fact that point size is measured by the printer block, not the size of the character that rests on top) to advance his "direct measure" theory that one must measure the actual printed letters. Justice MARKMAN is free to question the wisdom of this legislative choice, but he may not ignore it, nor may he pick and choose among the established technical definitions of the statutory terms.

[9] Craig, Scala & Bevington, *Designing with Type* (5th ed) (New York: Watson-Guptill Publications, 2006), p 17.

One thing is clear: the Legislature mandated that the petition type used be of a certain point size, but it did not mandate that a particular style of printed character be used. And therein lies the problem. It appears that printed characters of a particular style can be larger or smaller than other styles in the same point size.

Today, a modern Legislature might mandate the size of petition printing by reference to "fonts" rather than "points." And as the record in this case demonstrates, even fonts listed as being of the same size appear to be larger and smaller than one another depending on the style of font selected. Accordingly, a "direct measure" approach to sizing the printed characters such fonts produce would be no more productive than it is in measuring points.

Justice MARKMAN nevertheless concludes that the statutory reference to 14-point type means that the actual printed character set must measure $^{14}/_{72}$ of an inch high when measured from the top of the ascender of a lowercase letter (such as "h") to the bottom of the descender of a lowercase letter (such as "j"). He asks, how could the Legislature have made plainer this intention than by mandating "14-point boldfaced type"?

The Legislature used a commonly understood term, "point," which was and is understood to refer not to the size of the character printed but the block on which the character that produces the printed image sat. Thus, even though "type" can refer to the printed characters produced from a block of movable type, the *point measurement* of "type" exists by reference to the underlying block of type, not to the printed "type." The provenance of this definition is unchallenged. The Legislature need not have known precisely how printers designed type in order to have understood the general orders of size in typography and that 14-point type was larger than 12-point

because different type style families (now colloquially referred to as "fonts") use the available space differently, "[d]ifferent typefaces having the same point size may appear larger or smaller . . . ."[10] Therefore, plain-

or 8-point type. It used each of these sizes in the petition requirements. Those who frequently used printed materials generated with traditional printing methods in 1954—which would have included legislators, given that the Legislature had its own printing press—would have certainly understood the general notion of point sizing, in much the same way that most adults today are familiar with computer fonts, even if they know nothing about how those fonts were created.

The intervenor posits the claim that each individual letter must measure $^{14}/_{72}$ of an inch. However, if the Legislature wanted more directly to mandate the size of the actual printed characters, it could easily have stated that "the letters of the petition heading shall be 'X' tall" or, if it wanted to use printer's jargon, "the letters of the petition shall be 14 points in height." It did neither, presumably in reliance on the printing traditions then extant. Moreover, this argument founders when considering the whole of MCL 168.482. Subsections (3) and (5) both contain type size requirements. However, unlike subsection (2), they contemplate that the required text may appear in both capital and lowercase letters, which by definition have varying physical sizes. Nevertheless, the Legislature chose to use in subsections (3) and (5) the same terms—"point" and "type"—that it used in subsection (2).

[10] Craig, *Designing with Type*, p 18. Thus, an E-scale ruler provides only an approximation of type size and not an exact measurement of type size. This is because an E-scale ruler only contains an example of *one particular type style family* among the multitude of various styles of type in use. To the extent that other type style families measure slightly differently than the E-scale's example, the resulting E-scale measurement will not provide a precise determination of the type size shown.

Thus, contrary to the alternative method of measurement that the intervenor and Justice MARKMAN urge be used for determining type size by directly measuring the printed characters, the Board of State Canvassers cannot measure the type size of the petition heading simply by comparing the letters on the petition heading to a 14-point capital "E." Indeed, the most compelling evidence in the record that the E-scale ruler provides only approximate sizing of type is the affidavit of the intervenor's own expert, who indicated that one of the example headings that had been printed using 14-point metal type measured "slightly larger" than the 14-point capital "E" on an E-scale ruler. Moreover, the existence

tiff's expert correctly explained at the hearing before the Board of State Canvassers that the space on the top of a printer's block " 'becomes a canvas that a type designer gets to work with, and sometimes they use the whole canvas and sometimes they use part of the canvas.' "[11] Because type size incorporates some amount of additional space on the printer's block, and because different type style families use that space differently, different sized letters result even when printed from blocks of the same size.

C. WHEN A PETITION IS PRINTED USING COMPUTER GENERATED FONTS, IN ORDER TO ESTABLISH COMPLIANCE WITH THE STATUTORY TYPE SIZE REQUIREMENT, THE PETITION'S PROPONENT MUST SHOW THAT THE FONT USED FAITHFULLY REPLICATES WHAT A TRADITIONAL TYPE BLOCK WOULD HAVE GENERATED.

While these definitions of "point" and "type" are clear based on their customary technical meanings, the confounding issue in this case is how to apply these historical definitions in an age when digital printing predominates. Contrary to Justice MARY BETH KELLY's conclusion, we do not believe that the evidence available to us is sufficiently clear for this Court to take judicial notice that Microsoft's digital fonts replicate the point measure that the Legislature intended. Because digital fonts do not use physical printer's blocks, it is not self-evident that the system of digital fonts accurately replicates the movable type point system.[12] Plaintiff's

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of variation between different type style families undermines Justice MARKMAN's claim that application of the "printer's block" approach would not warrant a remand in this case.

[11] *Stand Up For Democracy v Bd of State Canvassers*, 297 Mich App 45, 57; 824 NW2d 220 (2012).

[12] Justice MARKMAN's detailed critique of Justice MARY BETH KELLY's resort to inconclusive materials outside the record reinforces our belief

Calibri heading may well actually comply with the statutory 14-point type requirement. However, simply choosing a digital "size 14" font does not prove that it is equivalent to the 14-point type standard that the Legislature required when it enacted MCL 168.482.

In light of the fact that no one understood when the Board of State Canvassers held the hearing that plaintiff was obligated to establish this equivalency, it is not hard to understand why its proofs consisted of little more than an attestation that its printer faithfully selected "size 14" Calibri font on his computer. Similarly, this is the reason why Justice MARY BETH KELLY must look outside the record and employ "judicial notice" in order to supply this critical missing set of proofs. Given that the computer font used in a petition must faithfully replicate what a movable type of the required point size would have produced in order to satisfy "actual compliance," we are hard pressed to understand how this equivalency could be established without evidence from Microsoft, the producer of the Calibri font used here, about not only how it programmed the font but whether it actually replicates what the traditional printer's type block would have produced.

I do not believe that the pastiche of extrarecord evidence relied on by Justice MARY BETH KELLY establishes these necessary proofs. And if they do, we lack sufficient computer expertise to confirm it.[13]

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that this Court has no competency to make the kind of factual determination that was never addressed and certainly not provided in the record.

[13] Ordinarily, we judges take judicial notice of things that cannot be disputed, such as the state of the moon on a given date as reflected in an almanac. The cycles and phases of the moon are, after all, constant and predictable. How Microsoft programmed its font system seems well shy of the certainty level required for the application of judicial notice.

Rather, we believe that the proper application of the statutory type size requirement in the context of a digital font requires plaintiff to show that a digital font accurately replicates the results that the point system would have generated. If plaintiff can show that the digitized font system it used accurately replicates a 14-point sized type that the point system would have generated, then it would be entitled to have its petition certified as sufficient. However, only with this showing can we know whether plaintiff's "size 14" Calibri font actually satisfied the statutorily mandated 14-point type size under the traditional movable type point system.

Because plaintiff has not proven the connection between its "size 14" font and the statutorily required 14-point type size, we do not believe that it is entitled to mandamus. Therefore, we concur in the decision to reverse the Court of Appeals panel decision on the merits, but we dissent from the decision to grant mandamus. Nevertheless, because the question

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If how Microsoft generated its font system and the question of its relationship to the sizing of traditional type blocks is not considered "technical"—outside the realm of common knowledge—then we are not sure what subject matter *would* qualify. Ordinarily, we judges rely on experts, not judicial notice, to resolve technical questions. For instance, MRE 201 allows a trial court to take judicial notice only of adjudicative facts that are "not subject to reasonable dispute" and that are either "generally known within the territorial jurisdiction of the trial court or . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). The questions presented here clearly are not of the kind that would qualify under MRE 201. More telling, almost no justification is offered in support of the application of judicial notice that "size 14" Calibri font generates the same result that the applicable point system would have yielded. We do not know whether the Web sources that Justice MARY BETH KELLY relies on are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," MRE 201, and she does not even assert that they meet this exacting standard.

whether the font system accurately reproduces what the point system would have produced has never been addressed and because a general substantial compliance rule erroneously had been recognized as a means of avoiding the actual requirements of this statute, we would permit a remand to the Board of State Canvassers to give plaintiff an opportunity to present proofs under the correct legal standard: that the digital font system actually replicates results that the movable type point system would have generated. Only upon such proof could plaintiff establish that the heading of its petition is in fact "14-point boldfaced type" as that phrase is properly understood.

ZAHRA, J., concurred with YOUNG, C.J.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ. (*concurring in part and dissenting in part*). We concur in Justice MARY BETH KELLY's holding that a writ of mandamus should issue in this matter. As a result of our concurrence on this point, Proposition 4 will appear on the ballot.

However, we strongly dissent from the grave actions taken by the justices supporting the position in part III(A) of Justice MARY BETH KELLY's opinion. Their decision to depart from 30 years of precedent by abandoning the substantial-compliance doctrine throws Michigan's electoral process into chaos and disenfranchises citizens from one of the most basic rights of democracy: the right to vote.

The holding of these justices that a mere clerical technicality—which has not and cannot be shown to create any harm whatsoever—could have prevented a referendum vote from taking place, in the face of more

than 200,000 citizens who signed the petition to place the referendum on the ballot, is unprecedented and highly disturbing.

That position lacks any sense of the gravity and importance of democracy. Article 1, § 1 of Michigan's Constitution states that "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Furthermore, our Constitution provides that "[t]he legislature shall enact laws to preserve the purity of elections" and "to guard against abuses of the elective franchise . . . ." Const 1963, art 2, § 4. MCL 168.482(2) is one of these laws, and it was intended to protect the election process,[1] but four justices have now turned it into a barrier that could prevent a vote from even taking place. Their holding will have a chilling effect on core political speech, and we cannot join this result. As the Court of Appeals so eloquently stated in *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 270; 553 NW2d 679 (1996):

> The wisdom of the principle of judicial restraint expressed by our Supreme Court in [*Attorney General v Ingham Circuit Judge*, 347 Mich 579; 81 NW2d 349 (1957)], is self-evident; the notion that our courts may precipitously intervene in the political arena and preempt a vote of the people is inconsistent with both the role of the courts and the principles of our democracy.

We vote to affirm the Court of Appeals and its issuance of mandamus. As stated, we also concur with Justice MARY BETH KELLY's issuance of mandamus. As a result, Proposition 4 will appear on the ballot. We note that, given Justice MARY BETH KELLY's finding of actual compliance—which must necessarily encompass sub-

[1] See, generally, *Kadans v Wayne Co Clerk*, 363 Mich 306, 308; 109 NW2d 788 (1961).

stantial compliance, because actual compliance is a *higher* standard than substantial compliance—there are four votes that find at least substantial compliance and allow the voters to determine the merits of this proposal. The determination of whether actual or substantial compliance is the proper standard is unnecessary to the decision in this case.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., concurred.

MARKMAN, J. (*concurring in part and dissenting in part*).

PROLOGUE

Although to many the present dispute over font size may seem to be "much ado about nothing much" and a debate concerning a mere "technicality," in which there may be only a "dime's width" of difference between what is required of petitions by the law and what is actually contained in the petitions before the Court, a considerably larger issue is implicated: how faithful must the branch of government that *interprets* the law be to the language adopted by the branch of government that *enacts* that law? It is important to bear in mind that the very same constitutional provision that provides for the right of referendum also provides that it "must be invoked in the manner prescribed by law," Const 1963, art 2, § 9, and it is the very same Constitution that provides for a representative form of government in which legislative majorities, not the views of a small percentage of the electorate, generally determine the course of public policy. Const 1963, art 4, § 1. As explained by Chief Justice Marshall in *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803),

which has been the lodestar for generations of judges in questions of statutory construction, the responsibility of a court of law is to declare what the law *is*, and not what it *ought* to be. This is one of the first principles of our system of separated constitutional powers.

In this case, the law in dispute provides that a petition heading "shall" be in 14-point type, the law has been amended by the Legislature to repudiate the idea of "approximateness," and the law explicitly limits the concept of "substantial compliance" to those circumstances in which a petition has been preapproved by the Secretary of State. The question then becomes whether "14-point type" means 14-point type. It is not, I believe, whether 10- or 12-point type is "close enough," or whether 10- or 12-point type is sufficiently legible, or whether it is "Dickensian," "crabbed," "pedantic," "hairsplitting," or "hypertechnical" to distinguish between 10- or 12-point type and 14-point type. Instead, "we the people" of Michigan have determined that an extraordinary constitutional procedure—one enabling a small segment of the people to enjoin a duly enacted law for up to two years—"must be invoked in the manner prescribed by law . . . ." Have the proponents of the present referendum acted "in the manner prescribed by law"? Should this Court, for example, in reviewing a law requiring 200,000 signatures to place a referendum on the ballot, find that 199,250 signatures is sufficient and constitutes "substantial compliance"? Should this Court, in reviewing a law establishing a five-year statute of limitations period, find that a lawsuit or prosecution undertaken five years and two months after an event is sufficient and constitutes "substantial compliance"? And should this Court, in reviewing a law requiring that a real estate filing be made within 180 days of some occurrence, find that 185 days is sufficient and constitutes "substantial compliance"? Perhaps it

should, but it should also be understood that when the law is "relaxed," or altered, in this manner, the law becomes less certain, more subject to judicial discretion and arbitrariness, less capable of clearly communicating to the people their rights and responsibilities, and more the subject matter of new lawsuits. To allow "substantial compliance" to satisfy the law when this has not been authorized by the Legislature is to accord more power to judges, and less power to legislative bodies and the people whom they represent, to say what the law "is."

It is the obligation of the judiciary to interpret the law in reasonable accord with its language, and I believe this has been accomplished when a law requiring that a printed heading be set forth in "14-point type" is interpreted to require "14-point type." It is neither a "strict" construction nor a "narrow" construction to render such an interpretation, but simply a "reasonable" construction—a construction that ordinary legislators and readers of the law would place upon this language. Had the Legislature been determined to ensure that certain petition headings would always be set forth in 14-point type, and that no gamesmanship would be tolerated in the form of such petitions, how could the Legislature have made this any more clear than by what it said in the law in dispute in this case? How could the Legislature have been any more straightforward in its intention to communicate that "*this* is what we intend, and *only* this, no more and no less"? The issue in this case, as it is in most cases before this Court, is more than the significance of a "dime's width" of difference between "14-point type" and a smaller type on a petition; rather, it is which institution of government gets to make decisions regarding what will be provided for in the law—the branch comprised of persons broadly reflective of the people in their full

range of backgrounds, interests, and professions, or the branch comprised exclusively of lawyers?

ANALYSIS

To begin with, it must be emphasized that the issue before this Court has nothing to do with our own personal beliefs regarding the wisdom, or the lack thereof, of the emergency financial manager law, or of the constitutionality of this law. Plaintiff is incorrect in its assertion that "the only substantial difference between the petition at bar and the [ones in earlier years that have placed matters on the ballot] is the subject matter and viewpoint of the [plaintiff]." Rather, the only two issues before this Court are (a) whether plaintiff actually complied with the 14-point-type requirement in MCL 168.482(2), and (b) if it did not comply, whether "substantial compliance" with this requirement is tantamount to compliance with the law. Because I would answer both of these questions in the negative, I would reverse that part of the judgment of the Court of Appeals holding that "substantial compliance" with MCL 168.482(2) is sufficient to warrant a grant of mandamus, a position with which the judges of that Court disagreed but nonetheless felt obligated to follow because of an earlier precedent of that Court. Pursuant to the clear direction of MCL 168.544d, while "a form prescribed by the secretary of state" must substantially comply with MCL 168.482(2), a form not "prescribed by the secretary of state," as in this case, must actually comply with that law. Therefore, although plaintiff suggests that our interpretation of the 14-point-type requirement in MCL 168.482(2) may prevent a number of petitions from reaching the ballot, each of the other petitions cited by plaintiff was apparently preapproved by the Board of State Canvassers,

and thus must only "substantially comply" with the 14-point-type requirement. Further, as highlighted on page 8 of plaintiff's own supplemental brief, even a cursory review of the other petitions will show that each is printed in visibly larger type than that in the instant petition.

(1) Plaintiff seeks a writ of mandamus against defendants. "Mandamus is an extraordinary remedy . . . ." *Musselman v Governor*, 448 Mich 503, 521; 533 NW2d 237 (1995). The plaintiff in a mandamus proceeding has the difficult burden of proving that the defendant has the clear legal duty to act in the way the plaintiff seeks. *Double I Dev Co v Taylor Twp*, 372 Mich 264, 269; 125 NW2d 862 (1964).

(2) Plaintiff urges this Court to direct that defendants certify for placement on the November 2012 general election ballot the referendum on Public Act 4 of 2011, MCL 141.1501 *et seq*., the Local Government and School District Accountability Act, commonly known as the emergency financial manager law. Generally, it is the right of the people of Michigan to have public policy determined by a majority of the people's democratically elected representatives in the Legislature. However, "[u]nder the referendum clause of the Constitution [Const 1963, art 2, § 9] one-twentieth of the electors of the State may suspend the operation, until the next general election, of any act of the legislature, however important [with certain exceptions] . . . . Where a power so great as this is vested in a minority of the people, every safeguard provided by law against its irregular . . . exercise should be carefully maintained." *Thompson v Secretary of State*, 192 Mich 512, 522-523; 159 NW 65 (1916).

(3) That is, there are constitutional rights in tension in this case, the constitutional right of the people to

have the enactments of representatives respected and given timely effect, i.e., the right to a republican form of self-government, see Const 1963, art 4, § 1; US Const, art IV, § 4, and the right of the people under specified circumstances to enjoin the effects of such laws during the referendum process. Const 1963, art 2, § 9. *Thompson* has properly addressed this tension by both recognizing the importance of the referendum process *and* insisting that this process, which involves a departure from the ordinary constitutional process by which laws are formulated, be undertaken in a "regular" fashion and in compliance with the law.

(4) Const 1963, art 2, § 9 provides that "[t]he power of referendum . . . must be invoked in the manner prescribed by law . . . ."

(5) MCL 168.482(2) provides:

> If the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum of legislation, the heading of each part of the petition *shall be* prepared in the following form and printed in capital letters in 14-point boldfaced type . . . . [Emphasis added.]

As this Court has stated numerous times, the word "shall" constitutes a mandatory directive. See, e.g., *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008).

(6) That the Legislature in 1965 amended MCL 168.482 by striking the language permitting the heading to be in "type of the *approximate* size set forth" and replaced it with the language, "*shall be* . . . in 14-point bold face type," underscores that the Legislature meant "shall be" to constitute a mandatory directive. (Emphasis added.)

(7) MCL 168.544d provides:

> Nominating petitions for the offices under this act and petitions for a constitutional amendment, initiation of

> legislation, or referendum of legislation or a local proposal may be circulated on a countywide form. Petitions circulated countywide *shall be on a form prescribed by the secretary of state, which form shall be substantially as provided in sections 482, 544a, or 544c*, whichever is applicable. The secretary of state may provide for a petition form larger than 8–1/2 inches by 13 inches and shall provide for identification of the city or township in which the person signing the petition is registered. The certificate of the circulator may be on the reverse side of the petition. *This section does not prohibit the circulation of petitions on another form prescribed by this act.* [Emphasis added.]

Accordingly, while "a form prescribed by the secretary of state" may "substantially comply" with MCL 168.482(2), a form not "prescribed by the secretary of state" must actually comply with MCL 168.482(2). To the extent that *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1; 654 NW2d 610 (2002), an opinion of the Court of Appeals, suggests that all petition forms, regardless of whether they were "prescribed by the secretary of state," need only "substantially comply" with MCL 168.482(2), it is wrong, in my judgment, because it is plainly inconsistent with the law. Therefore, I agree with the three other justices who conclude that the "substantial compliance" standard does not apply to forms that have not been "prescribed by the secretary of state."

(8) The form at issue in this case was not "prescribed by the secretary of state" because it was not preapproved by the Secretary of State, and it is not in compliance with the Secretary of State's *own* rule that the heading "shall be printed in capital letters in 14-point boldface[d] type . . . ." Secretary of State memorandum, Initiative and Referendum Petitions — Prescribed Format (revised June 2011), p 2. Therefore, the form must actually comply with MCL 168.482(2). As explained in the Secretary of State's memorandum,

Initiative and Referendum Petitions (January 2011), p 1, "While Michigan election law does not require the pre-approval of an initiative or referendum petition form, such approval greatly reduces the risk that signatures collected on the form will be ruled invalid due to formatting defects."

(9) Both MCL 168.482(2) and the Secretary of State's own rule require the heading on the form to be "printed in capital letters in 14-point boldfaced type."

(10) The term "point" in the printing context is defined as "a unit of type measurement equal to . . . 1/72 inch . . . ." *Random House Webster's College Dictionary* (2d ed, 1997), p 1006; see also *Webster's New Collegiate Dictionary* (1960), p 652 ("The value of the point is .013837 inch, or nearly 1/72 inch."), and *Spicer v Hartford Fire Ins Co*, 171 Va 428, 432; 199 SE 499 (1938) ("An inch is the American standard of linear measure. . . . A like standard, while it may not be so generally known, is now used in ascertaining the size of type. . . . [T]he point system of measuring type . . . was adopted in 1886 by the United States Type Founders' Association, although prior to that time many founders were using it.").

(11) The term "type" is defined consistently among dictionaries as being "a wood or metal block with a raised character on its surface that, when fixed into a press and coated with ink, prints an impression of the character on paper or a similar absorbent surface" or "a printed character or printed characters." *Random House Webster's College Dictionary* (2d ed, 1997), p 1391; see also *Webster's New Collegiate Dictionary* (1960), p 921 ("A rectangular block, usually of metal or wood, having its face so shaped as to produce, in printing, a letter, figure, or other character" or "the letters or characters impressed, collectively."). There-

fore, we must determine whether the term "type" in MCL 168.482(2) refers to the blocks used to produce the letters or to the actual printed letters themselves, and, contrary to Justice MARY BETH KELLY's contention, which of these definitions is ultimately controlling is hardly undisputed. Indeed, this matter is at the very heart of the dispute between plaintiff and the Governor, the Attorney General, and the intervening defendant. Also, contrary to the Chief Justice's and Justice MARY BETH KELLY's contention, and as is obvious in the language in this very paragraph, I do not "ignore" these alternative definitions, *ante* at 627 n 8, or "omit[] the definition's reference to blocks," *ante* at 609 n 40. Instead, I see fit to explain exactly *why* I believe the statute is better understood to incorporate the latter definition. See *infra* ¶¶ 12-16. Indeed, it is the Chief Justice who defines "type" as "a printed impression from type," *ante* at 624 n 4, but who "omits" the remainder of that definition that defines type *without* reference to letter blocks, to wit, "a printed impression from type: printed matter <very small type can be hard to read>."

(12) "Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). In the statute at issue here, the term "type" is used in a provision that states that "the heading of each part of the petition shall be . . . *printed in* capital *letters in* 14-point boldfaced *type*." MCL 168.482(2) (emphasis added). That the Legislature specifically used the words "printed" and "letters" indicates that the Legislature was referring to the actual printed letters rather than the blocks used to make these letters. That the Legislature used the word "in" rather than

"with" in two relevant places in the statute underscores this interpretation. The Chief Justice gives no consideration at all to this statutory language.

(13) Interpreting "type" to mean the actual printed letters is also consistent with the only reasonable legislative purpose that can be served by MCL 168.482(2), to wit, ensuring that the signers of petitions can easily *read* what it is that they are signing. Interpreting "type," on the other hand, to mean the blocks used in letter-press printing to produce letters would serve no conceivable purpose because the size of a block says nothing about the size of the letter produced by that block. Thus, requiring the preparer to merely use blocks that are physically $^{14}/_{72}$ of an inch in size would permit the actual printed letters on the petition to be of the very smallest and most unreadable size.

(14) It is noteworthy that the Chief Justice, who adopts the block argument, cites a treatise on printing that was written in 1918, but by 1954, when MCL 168.482(2) was originally enacted, there were many other methods of printing in addition to the less advanced letter-press method that requires individual blocks. For example, a printing press can use plates and does not require movable letter blocks; and offset printing uses a polyester or metal plate and does not require moveable letter blocks. All of these methods of printing, as well as others, were employed by 1954. Thus, the more reasonable interpretation of "type" is not "a wood or metal block . . . fixed into a press," because this suggests that only printed letters produced by a letter-press are compliant with the statute. This underscores that the "block" definition of "type" unnecessarily focuses on the *method* of production, rather than on the *result* of production, the text or type produced. While the former has no bearing on what will

actually be *read* by potential signers of petitions, the latter focuses precisely on what those signers will read.

(15) Indeed, given that blocks are increasingly not used in the modern printing industry, it is difficult to conceive of *how* this Court, or the Secretary of State, or the Board of State Canvassers, or the parties themselves could practically and accurately determine whether the "14-point type" requirement of MCL 168.482(2) has been satisfied in a given instance if "type" means blocks. There are *no* such blocks in this case because the 14-point Calibri font that was used on this petition was not produced by blocks. Indeed, the Calibri font did not even exist when printing blocks were more widely used.

(16) For these reasons, unlike the justices who adopt the printer's-block argument, I do not believe that the 14-point-type requirement of MCL 168.482(2) can be reasonably understood to refer to the size of the *blocks* used to print the letters; instead, I believe it must refer to the actual *printed letters* or *characters*.

(17) That MCL 168.482(2) refers to "the heading," and that "type" refers to "printed characters" or "letters or characters impressed, collectively" suggests that the grouping of letters that comprises the heading should be considered as a whole in determining the point size of the type. This is buttressed by the statute's requirement that "capital *letters*" must be printed "*in* 14-point boldfaced *type*." (Emphasis added.) That the statute specifies that the "letters" must be printed in the specified "type" strongly implies that the "type" must be considered as a whole in evaluating whether the point-size requirement has been satisfied. Contrary to Justice MARY BETH KELLY's contention, I do not conclude that the actual printed characters must *each* measure $^{14}/_{72}$ of an inch high, nor do I adopt different

ways of measuring type under MCL 168.482(2), (3), and (5). Rather, when measuring type under any of these statutory provisions, I conclude only that the language must be collectively measured as described in ¶ 18, *infra*.

(18) As the Court of Appeals explained, the customary practice in the printing industry is to use a specialized printer's ruler to determine the type size of printed text. *Stand Up For Democracy v Secretary of State*, 297 Mich App 45, 66 n 10; 824 NW2d 220 (2012). A typical printer's ruler has a scale to measure points, as well as the graduated-sized letter "E" in order to visually represent the range of type size, known as the "E-scale." To determine the point size of the printed text, the ruler is used to measure the distance in points between the ascender height, e.g., the top of the "h," and the descender height, e.g., the bottom of the "p." Thus, although a document may be printed in 14-point type, the actual point size of each letter will vary (e.g., a lowercase "x" will always be significantly less than $^{14}/_{72}$ of an inch because it does not contain an ascender or descender). In fact, all individual letters in 14-point type will measure less than $^{14}/_{72}$ of an inch because no letter in the English alphabet has both an ascender and a descender. If the printed text does not contain a letter with an ascender and a letter with a descender, the "E-scale" may still be used by comparing an E (or its nearest equivalent) in the text to the ones printed on the ruler. If an "E" in the text measures 14 points on the "E-scale," the type is "in 14-point."

(19) Although it is undisputed that the "font" used in the heading in this case was categorized by the Microsoft software as "14-point," it is also undisputed that the actual size of the printed "type" varies widely depending upon the particular "font" chosen. In other

words, a 14-point Calibri font may be of a considerably different type size than a 14-point Arial font. As the Court of Appeals correctly explained, " 'font' is *not* a unit of measurement." *Stand Up For Democracy*, 297 Mich App at ___ n 11, slip op p 12 n 11 (emphasis in original). That the Legislature imposed a "14-point type" requirement shows an intent to impose a specific type-size requirement, regardless of the particular font chosen.

(20) Justice MARY BETH KELLY's finding that there is "actual compliance" turns on the fact that Microsoft "defines 'font size' as the 'size of type . . . .' " *Ante* at 614. Although she recognizes that Microsoft does not purport in this definition to define "type," she *assumes* that Microsoft has employed the "printer's block" definition of "type" that she has earlier articulated. However, there is simply no evidence for that conclusion. In fact, the full definition of "font size" provided by Microsoft is:

> The size of type, measured in points between the bottom of the descender and the top of the ascender (the vertical point size of a font). Sometimes referred to as the Type or Point Size. [Microsoft Support, WD2002: *Definitions of Typography Terms in Word* <http://support.microsoft.com/kb/192973/en-us> (accessed August 1, 2012).]

This definition supports my ascender/descender measurement set forth in ¶ 18 *supra*, and not Justice MARY BETH KELLY's "invisible box" argument. Indeed, the diagram on the very same Microsoft typography page cited by Justice MARY BETH KELLY further illustrates that it is the height of the letters—from highest ascender to lowest descender—that controls, not the invisible box. For these reasons, I respectfully disagree with Justice MARY BETH KELLY, who concludes that because plaintiff's petition heading is

printed in a 14-point *font*, it "actually complies" with the 14-point-*type* requirement in MCL 168.482(2). By this analysis, the Legislature's ability to ever impose a *specific* type-size requirement in order to assure a minimum standard of legibility would be entirely frustrated.

(21) Because the heading on the form here is smaller than 14 points as measured by an E-scale ruler (and considerably so), the form is clearly not in compliance with either MCL 168.482(2) or the Secretary of State's rule. Therefore, plaintiff has failed to satisfy its burden of proving that defendants have any legal duty, much less a *clear* legal duty, for purposes of mandamus relief to certify the instant referendum for placement on the ballot.

(22) Although plaintiff argues that in the past 15 years at least 14 referendums have been placed on the statewide ballot even though their headings were also not 14 points in size, plaintiff acknowledges that all of those referendums were preapproved by the Secretary of State. Given this preapproval, those forms would only have had to "substantially comply" with MCL 168.482(2). Plaintiff, on the other hand, did not seek the Secretary of State's preapproval, and thus was required to actually comply with MCL 168.482(2), which it did not do.

(23) Further, it is telling that on page 8 of plaintiff's own supplemental brief, of the six other petition headings set forth in connection with matters that might appear on this year's ballot, each is in larger type than plaintiff's and five of these are in an identical or nearly identical typeface. While plaintiff may, or may not, be correct that its own heading "stands out for readability," it also stands out in the distinctiveness of its type size. Moreover, as the Board of State Canvassers and the Secretary of State indicate, the six other petitions

this year were each preapproved by the board, and thus subject only to substantial compliance with MCL 168.482(2).

(24) Concerning the approach of the remanding justices, I see no benefit to be derived from this approach, and the remanding justices fail to explain what the benefit might be. That is, no matter which justice among us has correctly identified the proper method of measuring type, all of the information necessary to assess whether plaintiff's petition satisfies the statute is already before us. See *infra* ¶¶ 25-27. Given existing time constraints, returning this case to the board would serve no purpose other than to effectively make the board, not this Court, the court of last resort on this issue. Before we do that, I would prefer to make the Court of Appeals the court of last resort, because that is what the Constitution and laws of our state certainly contemplate. I would not remand to the board without first providing it with relevant judicial guidance regarding what the law requires. The board has already deadlocked on the issue of type size and that is why this case is before the Court in the first place.

(25) First, if one adopts the "character size" approach, as I do, a remand is not warranted because MCL 168.482(2) requires the heading to be printed in 14-point type as measured by an E-scale ruler and the intervening defendant has submitted an affidavit that asserts that the heading in this case is not printed in 14-point type as measured by an E-scale ruler, and plaintiff has not argued to the contrary. Further, as the Court of Appeals explained, "[b]ecause 14-point is a unit of measurement *easily determined* by use of an E-scale ruler, neither this Court nor the Board requires expert testimony to determine whether the correct measurement has been met." *Stand Up For Democracy*,

297 Mich App at 66 n 10. That is, we can determine ourselves that "the heading on plaintiff's petition only measures 12 point on an E-scale ruler," *id*. at 67, and no remand to an expert body is required. What possible benefit would be derived from such a remand?

(26) Second, if one adopts the "printer's block" approach, as do the remanding justices, a remand is again unwarranted. The intervening defendant has also submitted an affidavit that provides that plaintiff's heading is clearly smaller than the same heading printed with a variety of 14-point blocks that it has obtained, and again plaintiff has not argued to the contrary. That is, while the intervening defendant has presented evidence that neither the actual printed letters nor the blocks satisfy the 14-point requirement, plaintiff has presented no contrary evidence. Instead, it has been the dominant focus of plaintiff's argument throughout this case that it has "substantially complied" with MCL 168.482(2) and that the difference between the 14-point type required by the statute and the type used in its petition heading, which measures 12 points on an E-scale ruler, amounts to merely a "dime's width of a difference." What possible benefit would be derived from a remand?

(27) Third, if one adopts the "font" approach, as do plaintiff and Justice MARY BETH KELLY, a remand is not warranted given that there is no dispute that plaintiff's petition was in 14-point Calibri font. What possible benefit would be derived from a remand?

(28) Further, for the same reasons that I do not believe that "substantial compliance" constitutes the appropriate legal standard, it is unclear to me how the remanding justices' "faithful replication" standard, in which the board must assess whether the letters pro-

duced by Microsoft's 14-point Calibri font are *close enough* to the letters produced by a 14-point Calibri block, if such a block can even be found, is any different than the "substantial compliance" standard that these justices themselves reject.

(29) For all these reasons, I would reverse that part of the judgment of the Court of Appeals holding that "substantial compliance" with MCL 168.482(2) is sufficient to warrant a grant of mandamus.

HILL v SEARS, ROEBUCK AND CO

Docket Nos. 143329, 143348, and 143633. Argued May 9, 2012. Decided August 16, 2012.

Marcy Hill, Patricia Hill, and Christopher Hill brought an action in the Macomb Circuit Court against Sears, Roebuck & Co., Sears Logistic Services, Inc., Merchant Delivery, Inc., Exel Direct, Inc., Mark Pritchard, Timothy Dameron, and others, seeking to recover damages for injuries and property damage incurred when Marcy Hill released natural gas through an uncapped gas line and plaintiffs' home burned down following Patricia Hill's attempt to light a candle and the resultant natural gas explosion. Defendants were prior owners of the home and the parties who sold, delivered, and installed an electric washer and dryer purchased by Marcy Hill in 2003. Hill's mother had directed the installers to place the washer and dryer in the same location where the prior owners' gas dryer had been situated. The prior owners had turned off the gas to the line supplying their dryer, but had not capped off the line when they moved, taking their dryer with them. In 2007, four years after the electric dryer's installation, during which time it had functioned without incident, Hill inadvertently opened the valve on the gas line. Marcy and Patricia Hill smelled gas throughout the day but did not act on this information, despite both women's knowledge that the smell of natural gas required safety precautions. Plaintiffs' home exploded that night when Patricia Hill attempted to light the candle with a lighter. Plaintiffs asserted that the installers had negligently installed the dryer and failed to discover, properly inspect, cap, and warn plaintiffs about the uncapped gas line. The court, Mark S. Switalski, J., denied the retailers', delivery companies', and installers' motions for summary disposition. The installers, Mark Pritchard and Timothy Dameron, appealed by leave granted. The Court of Appeals, MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ., affirmed in an unpublished opinion per curiam, issued May 24, 2011 (Docket No. 295071). The retailers, delivery companies, and the installers filed separate applications for leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the applications or take other peremptory action. 490 Mich 896 (2011).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices MARKMAN and ZAHRA, the Supreme Court *held*:

The installers owed no legal duty to plaintiffs with respect to the uncapped gas line. The installers and plaintiffs had a limited relationship that did not require the installers to undertake any action relative to the uncapped gas line, and the delivery and installation of the dryer did not create a new dangerous condition with respect to the uncapped gas line or make an existing dangerous condition more hazardous.

1. To establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed the plaintiff a legal duty, (2) that the defendant breached the duty, (3) that the plaintiff suffered damages, and (4) that the defendant's breach was a proximate cause of the damages. There can be no tort liability unless the defendant owed the plaintiff a duty. As a general rule, there is no duty that obligates one person to aid or protect another. Duties may arise from a statute, a contractual relationship, or by operation of the common law. At common law, whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person. It must be determined whether the social benefits of imposing a duty outweigh the social costs of imposing the duty. There must have been a relationship between the parties before a duty can be imposed, and the harm must have been foreseeable.

2. The installers contracted to deliver and install the electric washer and dryer. Their only common-law duty was to use due care when delivering and installing the electric washer and dryer, which the installers accomplished at the direction of Marcy Hill's mother in a total of 12 minutes. Because of this limited relationship, the installers were not required to undertake any action with regard to the gas line, and plaintiffs' negligence action failed as a matter of law.

3. Certain special relationships give rise to a duty when a person entrusts himself or herself to the control or protection of another, such as the relationship between common carriers and their passengers, innkeepers and their guests, and doctors and patients. The duty to protect is imposed on the person in control because that person is best able to provide a place of safety. There was no special relationship between the parties here because the installers' actions related only to the delivery and installation of the washer and dryer. Plaintiffs did not entrust themselves to the control or protection of the installers or lose

the ability to protect themselves. The installers did not owe plaintiffs a duty to warn because of plaintiffs' ignorance of and mistaken assumptions regarding the nature of the gas line. Plaintiffs had constructive notice of the gas line's existence because it was visible for a few weeks before the dryer was installed in front of it and knowledge of facts putting a person of ordinary prudence on inquiry is equivalent to actual knowledge of the facts that a reasonably diligent inquiry would have disclosed. The social benefits of imposing a duty under these circumstances would not outweigh the social costs because the result would absolve homeowners from any duty to protect themselves from hazards within their homes.

4. A duty separate and distinct from any contractual duty arises when an action creates a new hazard. The delivery and installation of the washer and dryer did not create a new dangerous condition with respect to the uncapped gas line or make an existing dangerous condition more hazardous. The hazard associated with the uncapped gas line was present when the installers entered the premises and when they left; the danger posed by the uncapped gas line was the same before and after the installation.

5. Any liability of the retailers or the delivery companies would have resulted from their agency relationship with the installers. The circuit court erred by denying the summary disposition motions.

Reversed and remanded for entry of an order granting defendants summary disposition.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, would have affirmed the Court of Appeals' judgment on the grounds that the installers owed plaintiffs a duty to warn of the potential hazards the gas pipe posed before their installation of the dryer concealed it. The installers had a duty to take reasonable safeguards to protect plaintiffs from harm and a duty to conform their conduct to that of a reasonable person when installing the washer and dryer. Justice KELLY would also have concluded that a duty to warn arose because of the relationship between the parties and because the installers had superior knowledge of the dangerous characteristics of an uncapped gas line. By contrast, plaintiffs did not know that the uncapped pipe was a gas line. Justice KELLY would have imposed a simple duty on defendant installers to warn of the dangers, limited to the area they occupied during the installation process and would not extend the duty to potential hazards unrelated to the electric dryer or its installation. The duty to use due care existed regardless of whether the installers' alleged negligence created a new hazard or increased the danger of an

existing one, but the installers also owed plaintiffs a duty to not worsen an existing hazard. The installers increased the existing danger by installing the dryer in such a way as to conceal the uncapped gas line.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Fraser & Souweidane, PC* (by *Stuart A. Fraser*), for Marcy Hill, Christopher Hill, and Patricia Hill.

Moffett, *Vitu, Lascoe & Packus, P.C.* (by *Jerry A. Lascoe* and *Michelle M. Holwey*), for Sears, Roebuck and Co. and Sears Logistics Services, Inc.

Kallas & Henk PC (by *Constantine N. Kallas* and *Courtney A. Jones*) for Exel Direct, Inc., and Merchant Delivery, Inc.

Secrest Wardle (by *Sidney A. Klingler* and *Thomas J. Azoni*) for Mark Pritchard and Timothy Dameron.

MARY BETH KELLY, J. These cases arise out of an explosion that destroyed plaintiff Marcy Hill's Clinton Township home after she released natural gas through an uncapped gas line, which ignited when her adult daughter attempted to light a candle, after they had both actually smelled the gas in the home throughout the day and evening. Plaintiffs[1] filed suit against the retailers, delivery companies, and installers of plaintiffs' electric dryer, which had been installed nearly four years earlier and had functioned without incident. We heard oral argument on the applications to consider in part "(1) whether the defendant installers of the electrical appliance, Mark Pritchard and Timothy Dameron, had a duty to the plaintiffs with respect to the uncapped gas line in their home that was

[1] "Plaintiffs" refers to Marcy Hill and her children, Patricia and Christopher Hill.

separate and distinct from their contractual duty to properly and safely install the electrical appliance" and "(2) whether these defendant installers created a new dangerous condition with respect to the uncapped gas line, or made an existing dangerous condition more hazardous . . . ."[2]

Because defendant installers and plaintiffs had a limited relationship that did not require defendant installers to undertake any action relative to the uncapped gas line, we hold that defendant installers owed no legal duty to plaintiffs with respect to the uncapped gas line in plaintiffs' home. Further, we conclude that the delivery and installation of the dryer did not create a new dangerous condition with respect to the uncapped gas line or make an existing dangerous condition more hazardous. We therefore reverse the judgment of the Court of Appeals and remand this case to the circuit court for entry of an order granting summary disposition for defendants.[3]

I. FACTS AND PROCEDURAL HISTORY

In August 2003, Marcy purchased a home from Charles and Oralia Lindsey. The home had a kitchen niche for the clothes washer and dryer. The Lindseys had used a natural-gas-powered dryer, which connected to a gas line that extended from the furnace room to the

[2] *Hill v Sears Roebuck & Co*, 490 Mich 896 (2011). Any liability of the retailers and delivery companies would result from their agency relationship with the installers.

[3] As used in this opinion "defendants" refers to the retailers, the delivery companies, and the installers. Plaintiffs' claims against defendant retailers and delivery companies are based on the theory that defendant installers were the agents of both the retailers and the delivery companies. Plaintiffs also sued the former owner of the home who installed the gas line and two other previous owners, but none of these individuals are involved in this appeal.

kitchen niche.[4] When the Lindseys moved out of the home, they took their appliances with them and turned off the gas to the line supplying the dryer. They did not put a pipe cap on the end of the gas line in the kitchen, the end of which was visibly apparent.

A few weeks later, Marcy purchased a new washer and an electric-powered dryer from defendant retailers.[5] The appliances were delivered by defendant delivery companies[6] and installed by Pritchard and Dameron on September 8, 2003.[7] At the direction of Marcy's mother, defendant installers positioned the appliances in the designated area of the kitchen, in the same spot where the Lindseys' washer and dryer had been. After its installation, the electric dryer functioned without incident for almost four years.

On May 19, 2007, Marcy's kitchen faucet and the pipes under her sink required repair. The next day, after seeking repair advice, Marcy attempted to turn off the main water supply by turning various valves in the furnace room. In doing so, Marcy inadvertently opened the natural gas valve supplying the uncapped gas line in the kitchen. After smelling natural gas, Marcy attempted to shut off the valve by returning it to what she thought to be its original position, but she did not close the valve. Marcy continued to smell gas periodically throughout the day. Although she knew she "was supposed to call someone" under the circumstances, she did

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[4] A prior owner, Albert Kimpe, had installed the gas line.

[5] Sears, Roebuck and Co. and Sears Logistic Services, Inc., which contracted for the delivery.

[6] Exel Direct, Inc., and Merchant Delivery, Inc.

[7] Defendant Sears Logistic Services, Inc., contracted with defendant delivery companies to perform delivery services, who in turn subcontracted the delivery and installation services to defendant installers. Plaintiffs are not a party to any of these contracts.

not do so.[8] Instead, Marcy opened the windows and "thought there was nothing wrong," continuing to light and smoke cigarettes throughout the evening.

Later, when Marcy's daughter, Patricia, arrived, she told Marcy that she smelled gas. Like Marcy, Patricia knew the smell of gas "was dangerous" and that she should "get out of the house."[9] While Marcy and her daughter continued to periodically smell gas, they both continued to light and smoke cigarettes indoors and did nothing to remedy the situation except to open the windows.[10] That evening, both Marcy and her son went to bed, while Patricia went out. When Patricia returned home at about 3 a.m., she again smelled gas near the dryer.[11] Patricia then went to the living room, where she attempted to light a candle with a lighter. According to Patricia, "as soon as the lighter ignited," the house exploded. Plaintiffs escaped from the burning house, but all of them suffered some injuries.

Plaintiffs filed a lawsuit against the instant defendants, alleging that defendant installers negligently installed the new electric dryer and failed to properly inspect the uncapped gas line, discover the uncapped gas line, cap the gas line, and warn or give notice to plaintiffs of the uncapped gas line. Defendant installers

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[8] Marcy admitted at her deposition that she had received gas bills that included instructions to immediately call the gas company if the smell of gas was detected.

[9] At her deposition, Patricia indicated she had "graduate[d] from the D.A.R.E. program [in which] we all learned in fifth grade [that] if you smell gas [you're to get out of the house immediately]."

[10] Apparently, the smell of natural gas was sufficiently strong that plaintiffs' neighbors told investigators and news reporters that they had smelled the gas before the explosion.

[11] Patricia testified at her deposition that she did not smell gas upon returning home at 3 a.m., but an insurance investigation report indicates that Patricia told the investigator that she did.

moved for summary disposition under MCR 2.116(C)(8) and (10), while defendant retailers and delivery companies moved for summary disposition under MCR 2.116(C)(10). Defendant installers asserted that they did not owe plaintiffs a cognizable duty because they did not create a "new hazard" that did not previously exist and they had "absolutely no interaction" with the gas line. Defendant retailers and delivery companies argued that they had no duty to protect plaintiffs from the gas line, noting that they had merely sold Marcy the dryer or arranged for delivery services.

The circuit court first denied defendant retailers' and delivery companies' motions for summary disposition, reasoning in part that, "at a minimum, [these] defendant entities owed a duty to plaintiffs not to make the situation involving the uncapped gas line worse." The circuit court also denied defendant installers' motion for summary disposition, explaining:

> [T]here is a social policy which applies to delivery personnel such that they are precluded from entering an individual's home and making a dangerous situation even worse. Plaintiffs have presented sufficient evidence that the uncapped gas valve, coupled with its concealment by the location of a new appliance, created a foreseeable risk of harm. There is no evidence that [defendant installers] attempted to cap the open gas valve or warn plaintiffs about the hazard. It cannot seriously be disputed that the nature of the harm posed a very serious risk. The Court therefore concludes that [defendant installers] owed a duty to plaintiffs not to make the hazard created by the uncapped gas valve worse by their actions, including, but not limited to, positioning the new appliances in such a way as to conceal the hazard from view.[12]

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[12] Citations omitted. After the circuit court denied defendant installers' motion for summary disposition, defendant delivery companies brought a motion for clarification of the duty owed to plaintiffs. In a written opinion and order, the circuit court stated, "[T]he only duty that [defendant delivery

Defendant installers sought interlocutory leave to appeal in the Court of Appeals, which granted leave and affirmed the circuit court in an unpublished opinion per curiam.[13] Addressing the issue of duty, the Court of Appeals held that defendant installers had a duty not to make the uncapped gas line more dangerous by "concealing" it with the electric dryer. The panel explained, "[T]he hazard that allegedly caused the explosion did not exist until [defendant installers] installed the dryer in a way that prevented the discovery of the uncapped gas line."[14]

Defendants filed separate applications for leave to appeal in this Court. We heard oral argument on the applications. In lieu of granting leave to appeal, pursuant to MCR 7.302(H)(1), we reverse the judgment of the Court of Appeals.

II. STANDARD OF REVIEW

We review de novo a circuit court's determination on a motion for summary disposition under MCR 2.116(C)(10).[15] Whether a defendant owes a plaintiff a duty of care is a question of law decided by the circuit court.[16] We review de novo the determination whether a duty exists.[17]

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companies] owed to plaintiffs was to refrain from making the situation involving the uncapped gas valve any worse than it already may have been."

[13] *Hills v Sears Roebuck & Co*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 295071).

[14] *Id.* at 3 (emphasis added).

[15] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Because the circuit court considered evidence outside the pleadings when it denied defendant installers' motion for summary disposition, we consider the circuit court's determination to be based on MCR 2.116(C)(10), as opposed to (C)(8).

[16] *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

[17] *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

III. ANALYSIS

To establish a prima facie case of negligence, a plaintiff must prove that "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages."[18] This negligence action, however, principally concerns the element of duty and requires us to consider the threshold question whether defendants owed plaintiffs any of the claimed legal duties when the dryer was sold, delivered, and installed in plaintiffs' home nearly four years before the explosion.[19] Defendants argue that the lower courts erred by concluding that they owed plaintiffs a duty to not create a new hazard by "concealing" an open view of the gas line. Plaintiffs counter that defendant installers owed a duty to either cap the gas line or warn plaintiffs of the existence of the uncapped line.

A. LEGAL DUTY

" 'It is axiomatic that there can be no tort liability unless [a] defendant[] owed a duty to [a] plaintiff.' "[20] Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others.[21] However, as a general rule, " 'there is no duty that obligates one person to aid or protect another.' "[22] Generally, the duty that

[18] *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

[19] See *Fultz*, 470 Mich at 463 (noting that the threshold question in a negligence action is whether the defendant owed a duty to the plaintiff).

[20] *Id*., quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997).

[21] *Loweke*, 489 Mich at 165, citing *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

[22] *Loweke*, 489 Mich at 164, quoting *Williams v Cunningham Drug Stores*, 429 Mich 495, 499; 418 NW2d 381 (1988).

arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law, as plaintiffs allege in this case.[23]

At common law, "[t]he determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part *to act* for the benefit of the subsequently injured person."[24] "[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty."[25] Factors relevant to the determination whether a legal duty exists include the "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented."[26] We have recognized, however, that "[t]he most important factor to be considered [in this analysis] is the relationship of the parties" and also that there can be no duty imposed when the harm is not foreseeable.[27] In other words, "[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable."[28] If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors.[29]

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[23] *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

[24] *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505-506; 740 NW2d 206 (2007) (quotation marks and citations omitted; emphasis added); see also *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

[25] *In re Certified Question*, 479 Mich at 505 (citations omitted).

[26] *Id*. (quotation marks and citations omitted).

[27] *Id*. at 505, 508.

[28] *Id*. at 509.

[29] *Id*. at 508-509.

Plaintiffs argue that defendant installers had a common-law duty to cap the gas line or warn plaintiffs of its existence.[30] As noted, in determining whether a legal duty should be imposed in this case, we first consider the parties' relationship. In *Dyer v Trachtman*,[31] a medical malpractice case, we focused on the relationship between the parties to determine whether the defendant doctor, who performed an independent medical examination (IME) of the plaintiff, owed a duty to the plaintiff.[32] We recognized in *Dyer* that because the parties only had a limited relationship, unlike that between a patient and treating physician, the defendant only owed a limited duty to the plaintiff commensurate with his performance of the IME.[33] Because only a limited relationship existed, only a limited duty could be imposed, and consequently, it was unnecessary to consider the other factors relevant to determining whether a duty existed.[34]

As in *Dyer* the parties in this case had a limited relationship, which was simply that of a customer and an installer of electrical appliances. And although a contractual relationship existed to meet this end, plaintiffs concede that defendant installers satisfied their contractual obligations by delivering and installing the washer and electric dryer. Instead, plaintiffs assert that

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[30] Because plaintiffs raise an agency theory of liability against defendant retailers and defendant delivery companies based on those defendants' relationship with defendant installers, our analysis focuses solely on whether defendant installers owe plaintiffs any duty related to the gas line.

[31] *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004).

[32] *Id*. at 47-50.

[33] *Id*. at 49-50.

[34] *Id*.; see also *In re Certified Question*, 479 Mich at 507 (explaining that it is unnecessary to consider the additional factors when only a limited relationship exists).

defendant installers had a common-law duty to take certain actions with respect to the uncapped gas line.[35] The limited duty defendant installers undertook, however, was only to properly deliver and install the washer and electric dryer in plaintiffs' home. Certainly every person engaged in the performance of an undertaking has " 'an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.' "[36] Here, the limited undertaking in which the defendant installers were engaged was the delivery and installation of a washer and an electric dryer. The contract did not obligate them to inspect, cap, or in any manner touch the gas line. Having engaged to perform this undertaking, defendant installers had a common-law duty to do so with due care, and the record reflects that they did so.

Defendant installers entered plaintiffs' home for this limited purpose only once, for a total of 12 minutes. Further, the task was accomplished in a nonnegligent manner at the direction of Marcy's mother, as demonstrated by the fact that the electric dryer functioned without incident up until the time of the explosion. No record evidence suggests that defendant installers asserted any duty relative to the gas line, let alone any duty to inspect or warn plaintiffs about the gas line. Given the limited nature of the relationship between defendant installers and plaintiffs, defendant installers were under no obliga-

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[35] As we recently explained in *Loweke*, 489 Mich at 171:

> [I]n determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question . . . is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law.

[36] *Id.* at 165, quoting *Clark*, 379 Mich at 261.

tion to warn of or cap the gas line or undertake *any* action relative to the gas line, but only had an obligation to use due care when installing the appliances.[37] Because the limited relationship of the parties did not require defendant installers to undertake any action with regard to the gas line, plaintiffs' negligence claim fails as a matter of law.

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[37] Plaintiffs cite *Girvan v Fuelgas Co*, 238 Mich App 703; 607 NW2d 116 (2000), to argue that the parties' relationship requires the imposition of a duty, but *Girvan* does not support their position. Rather, in an opinion authored by then Judge ZAHRA, the Court of Appeals recognized that a gas supplier

> has a duty to ensure that its product is delivered safely to the exterior of the premises of the end user but, in the absence of an agreement to do otherwise, that duty does not extend to the inspection of the interior lines, conduits, and appliances over which the supplier has no control. [*Girvan*, 238 Mich App at 714.]

The *Girvan* Court relied on caselaw from this Court that recognized that a duty could be imposed on suppliers of dangerous commodities only if the supplier was negligent in performing the function it agreed to perform. See *Gadde* v *Mich Consol Gas Co*, 377 Mich 117, 126; 139 NW2d 722 (1966); *Kevreson v Mich Consol Gas Co*, 374 Mich 465; 132 NW2d 622 (1965); *Young v Lee*, 310 Mich 42; 16 NW2d 659 (1944). Because the gas supplier in *Girvan* did not expressly agree to an inspection of the interior gas lines, the Court of Appeals concluded that the defendant had no duty in that regard. And like the defendant in *Girvan*, defendant installers here did not expressly agree to enter plaintiffs' premises for the purpose of inspecting the gas line. The dissent, however, suggests that *Girvan* supports imposition of a duty because *Girvan* recognized that a "reasonable person should seek expert assistance when dealing with dangerous commodities on the person's premises" and, according to the dissent, plaintiffs did seek expert assistance from defendant installers to install their electric dryer. *Post* at 679 n 14. Yet *Girvan* is irrelevant in this regard because while plaintiffs did seek expert assistance to install an electric dryer, plaintiffs never sought expert assistance with respect to the smell of natural gas and, at the time of installation, defendant installers were not dealing with a dangerous commodity. Thus, we do not "fail[] to recognize" that plaintiffs sought expert assistance to install their appliances. *Post* at 679 n 14. The dissent has simply mischaracterized the record and our opinion.

Plaintiffs, however, argue that defendant installers had a duty to take action with regard to the gas line. Plaintiffs' argument is flawed because it wrongly assumes that defendant installers, having undertaken to deliver and install the washer and electric dryer, assumed other responsibilities not associated with the delivery and installation of the washer and dryer.[38] Defendant installers did not act on the gas line. They only delivered and installed the dryer. Thus, having not undertaken by contract or otherwise to act on the gas line, they had no duty to plaintiffs with respect to it.[39]

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[38] The dissent makes the same flawed assumption when it asserts that defendant installers had a duty to warn plaintiffs of the gas line because of their "superior knowledge" of "gas lines, appliances, and their installation." *Post* at 674-675. In reaching this conclusion, the dissent disregards the limited relationship of the parties, which, as we have explained, in no way imposed a duty on defendant installers to "take reasonable safeguards to protect plaintiffs from harm." *Post* at 674. Further, even assuming that defendant installers possessed some superior knowledge, they were under no obligation to warn plaintiffs about the gas line because it was highly visible and defendant installers would have no reason to believe that plaintiffs, the homeowners, would not have realized its dangerous condition. The products-liability case the dissent relies on in support, *post* at 674-675, is inapposite for this reason, as well as the fact that defendant installers were the manufacturer of neither the gas line nor the dryer.

[39] Plaintiffs are essentially asking this Court to hold that defendant installers had a duty to warn or otherwise protect them from an observable hazard that was created by a third party (a prior homeowner). But such a holding, which the dissent also advocates, is directly contrary to the common law, which does not "obligate[] one person to aid or protect another" except "where a special relationship exists between a plaintiff and a defendant." *Williams*, 429 Mich at 499. We have recognized several special relationships, such as common carriers and their passengers, innkeepers and their guests, and doctors and their patients, but this Court has never held that a special relationship exists between an appliance installer and homeowners or home occupiers. Indeed, the dissent's reliance on *Huhtala v Travelers Ins Co*, 401 Mich 118, 130; 257 NW2d 640 (1977), *post* at 674 n 5 and 676 n 9, for the proposition that defendant installers had a duty to warn plaintiffs about the gas line is unavailing because *Huhtala*'s discussion of a duty to protect refers to

Plaintiffs also suggest that we should conclude that defendant installers owed plaintiffs a duty because of plaintiffs' ignorance of and mistaken assumptions regarding the gas line.[40] We decline to impose a duty on the basis of ignorance or mistaken assumption under these facts because the indicia necessary for imposing a duty based on a special relationship are plainly absent. We have recognized that certain types of special relationships, such as common carriers and their passengers, innkeepers and their guests, and doctors and patients, justify the imposition of a duty because a person entrusts himself or herself to the control of another person. We have explained the rationale behind imposing a duty in such situations:

> Social policy . . . has led the courts to recognize an exception to th[e] general rule [that there is no duty that obligates one person to aid or protect another] where a special relationship exists between a plaintiff and a defendant. . . . The rationale behind imposing a duty to protect in these special relationships is based on control. *In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety*.[41]

Defendant installers' actions here related solely to the delivery and installation of the washer and electric dryer, which occurred *in plaintiffs' home*, which is

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cases in which that duty arose as a result of special relationships. In this case, there being no common-law duty to act, defendant installers had no obligation to act for the benefit of the homeowner or occupiers in regard to hazards created by third parties.

[40] During her deposition, Marcy testified that she "didn't know," in terms of gas and electric, what lines were in the kitchen and that she "kind of assumed Sears did all that." She stated: "I didn't know that stuff, details. I thought Sears did that stuff when they came out."

[41] *Williams*, 429 Mich at 499 (emphasis added).

quintessentially the place where plaintiffs are most in control and "best able to provide a place of safety" for themselves.[42] It is not the result of defendant installers' actions, that plaintiffs ceded control of their home, thereby "entrust[ing] [themselves] to the control and protection of another . . . ."[43] Plaintiffs never lost control of the gas line. Plaintiffs easily could have at any time capped the line or removed it or, once they smelled gas, called the gas company to ensure their own safety, as well as that of the premises. Instead, plaintiffs simply chose not to undertake these obvious safety precautions, despite Marcy's concession that she knew to call the gas company if she detected the odor of natural gas. Given that the limited relationship between an appliance installer and homeowners or occupiers is such that the homeowners or occupiers neither entrust the appliance installer with their control and protection nor lose the ability to protect themselves, we decline to modify the common law and impose a duty on such an installer to act for the benefit of the homeowners or occupiers in regard to hazards created by third parties. Indeed, we are not aware of a single Michigan case that imposes a legally cognizable duty when a competent adult chooses to remain ignorant about a condition within his or her complete control; likewise, we are not aware of any caselaw holding that a party's silent, unspoken assumptions impose an affirmative legal duty on another party to act in accordance with those unshared assumptions.

Moreover, regarding the duty to warn, we note that the circumstances of the relationship between defendant installers and plaintiffs did not give rise to any legal obligation on defendant installers' part because plaintiffs knew about the uncapped gas line before

[42] *Id*.

[43] *Id*.

installation of the dryer. It is uncontested that the uncapped gas line was fully visible for several weeks between the time Marcy bought the home in August 2003 and September 8, 2003, when the dryer was installed. At her deposition, Marcy acknowledged that she had lived in the house for "a few weeks" before the washer and dryer were installed, that the open kitchen niche was "highly visible" during this time, and that she saw the pipe in the kitchen niche but "thought [the pipes] were water lines." These undisputed facts establish that plaintiffs had constructive notice of the gas line's existence. This Court considered constructive notice in *Converse v Blumrich*, stating:

> A person is chargeable with constructive notice where, having the means of knowledge, he does not use them. . . . If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained.[44]

Plainly, Marcy's admission that she was aware of the pipes in the kitchen niche should have led her, using "ordinary caution," to make further inquiries regarding the nature of the pipes. Instead of making further inquiries or using ordinary diligence, Marcy merely "kind of assumed Sears did all that." Therefore, plaintiffs are considered to have notice of the "highly visible"

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[44] *Converse v Blumrich*, 14 Mich 109, 120 (1866) (citations omitted). Black's Law Dictionary (9th ed), p 1164, defines "constructive notice" as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of . . . ." Although neither Patricia nor Christopher testified that they actually saw the kitchen pipes, the fact that the pipes were highly visible in a high-traffic area of the home for nearly a month also supports imputing notice to Patricia and Christopher.

gas line because "[k]nowledge of facts putting a person of ordinary prudence on inquiry *is equivalent to actual knowledge* of the facts which a reasonably diligent inquiry would have disclosed."[45] Because "there is no duty to warn someone of a risk of which that person is aware,"[46] plaintiffs' theory that defendant installers had a duty to warn them of the gas line necessarily fails as a matter of law.[47]

In summary, because only a limited relationship existed between the parties, through which defendant installers undertook only to nonnegligently install electric appliances, it is not necessary for us to consider the additional factors related to whether a duty exits.[48] Plaintiffs nonetheless urge us to alter the common law and consider policy reasons that support the imposition of a duty. However, it is precisely because the social benefits of imposing a duty do not outweigh the social

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[45] *Deputy Comm'r of Agriculture v O & A Electric Co-Op, Inc*, 332 Mich 713, 716; 52 NW2d 565 (1952) (emphasis added). In reaching this conclusion, we have not somehow "confuse[d]," *post* at 680, plaintiffs' knowledge of the pipe with knowledge that the pipe was dangerous, but have simply applied the law as it pertains to constructive notice. Indeed, it is the dissent that "confuses," *post* at 680, these principles of constructive notice because it would require that plaintiffs had actual notice of the uncapped gas line's potentially dangerous condition before imputing that knowledge to plaintiffs.

[46] *Groncki v Detroit Edison Co*, 453 Mich 644, 656; 557 NW2d 289 (1996) (opinion by BRICKLEY, C.J.).

[47] Likewise, the Court of Appeals' reasoning that defendant installers breached a duty to not create a new hazard or make an existing hazard worse by "install[ing] the dryer in a way that prevented the discovery of the uncapped gas line," *Hill*, unpub op at 3, fails for the same reason. Plaintiffs already had notice of the gas line *well before* defendant installers arrived to install the appliances. It is simply illogical to conclude that defendant installers' actions *prevented* plaintiffs' discovery of the gas line when plaintiffs already had notice of it. Placing the dryer in front of the gas line does not somehow change the knowledge that plaintiffs had already acquired.

[48] *In re Certified Question*, 479 Mich at 506-507.

costs that we will not do so.[49] If liability were imposed on defendants for failure to cap the gas line or to warn plaintiffs of the uncapped gas line, then similarly situated defendants would presumably also owe a duty to a plaintiff to inspect and prevent all other hazards that the defendant might encounter in a customer's home. The burden imposed on defendants would be onerous and unworkable because they would be required to protect their customers from potential hazards they might encounter in the customer's home when, in fact, it is the *homeowners* who are best equipped to be aware of their home's potential hazards and protect themselves accordingly.[50] Indeed, it is difficult to envision what social benefit would result were we to recognize plaintiffs' claim because the result would be to absolve homeowners from any duty to protect themselves from hazards *within their own homes*. As we have previously explained:

> [W]e have on occasion allowed for the development of the common law as circumstances and considerations of public policy have required. See, e.g., *Berger* [*v Weber*, 411 Mich 1; 303 NW2d 424 (1981)]. But as Justice YOUNG has recently observed, our common-law jurisprudence has been guided by a number of prudential principles. See Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and

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[49] *Id*. at 505.

[50] The dissent suggests that if a duty to warn were imposed, the scope of a defendant's duty would be limited and workable. However, the dissent essentially agrees that a defendant's potential duty would extend to all areas of a plaintiff's home that the defendant works in and traverses. And while the dissent attempts to limit an appliance installer's duty to hazards related to the appliance or its installation, it has not explained how to discern which hazards are related and which are "unrelated." *Post* at 678.

> undesirable consequences," *id.* at 307, a principle that is quite applicable to the present case.[51]

Accordingly, we continue to adhere to our common-law concept of duty that is circumscribed by the bounds of the parties' relationship.

B. NEW HAZARD

To avoid preclusion of their negligence claim, plaintiffs allege that defendant installers created a new hazard by placing the electric dryer in front of the gas line. As this Court stated in *Fultz*, one breaches a duty that is "separate and distinct" from the contract when it creates a "new hazard."[52] Thus, the remaining issue is whether defendant installers created a new hazard when they installed the washer and dryer in front of the gas line.

The delivery and installation in this instance did not create a new dangerous condition with respect to the uncapped gas line or make an existing dangerous condition more hazardous. The hazard—the uncapped gas line—was present when defendant installers entered the premises, and it was present when they left. The placement of the dryer did not affect the existence or nature of the hazard in any manner because the danger posed by the uncapped gas line was *exactly the same* before and after the electric dryer was installed.[53] The delivery and installation in this instance did not create a new dangerous condition with respect to the uncapped

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[51] *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2d 684 (2005).

[52] *Fultz*, 470 Mich at 468-469 (emphasis omitted).

[53] The dissent's opposite conclusion lacks logic. That the uncapped gas line was concealed from view did not somehow worsen the already dangerous condition of the gas line. While the dissent suggests that a visible danger is less dangerous than an "invisible" one, *post* at 683, this theory fails under the circumstances of this case in which the character

gas line, or make an existing dangerous condition more hazardous. Therefore, the Court of Appeals erred by concluding that defendant installers breached a duty not to create a new hazard.

IV. CONCLUSION

Defendant installers and plaintiffs had a limited relationship that required the former to properly install electrical appliances in plaintiffs' home. Because that limited relationship did not require defendant installers to undertake any action with respect to the uncapped gas line, they owed plaintiffs no duty with respect to the gas line as a matter of law. Further, the delivery and installation of the dryer did not create a new dangerous condition with respect to the uncapped gas line or make an existing dangerous condition more hazardous. Thus, the lower courts erred by denying defendants' motions for summary disposition on the basis that defendants owed plaintiffs a duty. We therefore reverse the judgment of the Court of Appeals and remand this case to the circuit court for entry of an order granting summary disposition in favor of defendants.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

MARILYN KELLY, J. (*dissenting*). This interlocutory appeal presents a narrow question. It is whether the two defendants who installed plaintiff Marcy Hill's electric washer and dryer owed plaintiffs a legal duty in tort with respect to plaintiffs' uncapped gas pipe. It is not about what duties were owed to plaintiffs by the

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of the gas line remained the same before and after the dryer's installation and, as the dissent admits, plaintiffs already knew of the pipe's existence before the dryer's placement.

former owners of the house. It is not about what duties were owed by the party who detached and removed the gas dryer. It is not about whether any of those parties or any defendant in this case ultimately should be held liable for the gas explosion that destroyed plaintiffs' home.

The majority concludes that the installers, defendants Mark Pritchard and Timothy Dameron, owed no duty in tort to plaintiffs related to the gas pipe. It further concludes that the installation of the dryer did not create a new hazard or make an existing dangerous condition more hazardous. It finds that all defendants are entitled to summary disposition of all of plaintiffs' claims. I disagree with these conclusions. As a consequence, I respectfully dissent.

DEFENDANTS OWED PLAINTIFFS A LEGAL DUTY TO WARN

It is axiomatic that there can be no liability in tort unless the defendant owes a duty to the plaintiff.[1] In assessing this issue, we examine whether an actor has a legal obligation "to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others."[2] " 'In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.' "[3]

We consider several criteria when evaluating whether a duty exists, including (1) the relationship of

[1] See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

[2] *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

[3] *Schultz v Consumers Power Co*, 443 Mich 445, 449-450; 506 NW2d 175 (1993), quoting Prosser & Keeton, Torts (5th ed), § 53, p 356.

the parties, (2) the foreseeability of harm, (3) the burden on the defendant, and (4) the nature of the risk presented.[4] Applying these criteria, I would hold that when they concealed the uncapped gas pipe, the installers owed plaintiffs a duty to warn them of the potential hazards it posed.

The first criterion to consider when evaluating the existence of a legal duty is the relationship of the parties. There was a direct relationship between the installers and plaintiffs. The installers entered plaintiffs' home for the purposes of delivering and installing a washer and an electric dryer. In addition to their contractual duties, the installers had a duty to take reasonable safeguards to protect plaintiffs from harm.[5] While performing the installation, they also had a duty to conform their conduct to that of a reasonable person.

At the summary disposition hearing, plaintiffs presented evidence that the installers either were aware of, or should have been aware of, the uncapped gas pipe when they were installing plaintiffs' electric dryer. This is because they have a level of sophistication and knowledge superior to that of plaintiffs with respect to the dangers associated with gas lines, appliances, and their installation. This Court has recognized and imposed a duty on the manufacturer or seller of a product because that party has superior knowledge of the product's dangerous characteristics.[6] Here, the installers had superior knowledge of the dangerous characteris-

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[4] *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

[5] *Huhtala v Travelers Ins Co*, 401 Mich 118, 130; 257 NW2d 640 (1977) ("The relationship of the supplier of services with the consumer, although contractual in inception, [gives] rise to a duty imposed by law on the supplier, apart from the terms of their agreement, to take reasonable safeguards to protect the consumer.").

[6] *Glittenberg v Doughboy Recreational Indus (On Rehearing)*, 441 Mich 379, 391; 491 NW2d 208 (1992).

tics of a pipe that they concealed from plaintiffs with their product. A duty to warn should arise in both circumstances.

The duty to warn in this case is analogous to the duty that this Court described in *Glittenberg v Doughboy Recreational Industries (On Rehearing)*.[7] In *Glittenberg*, the Court held that

> [a] duty is imposed on a manufacturer or seller to warn under negligence principles summarized in § 388 of 2 Restatement Torts, 2d, pp 300-301. Basically, the manufacturer or seller must (a) have actual or constructive knowledge of the claimed danger, (b) have no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fail to exercise reasonable care to *inform* [*users*] *of its dangerous condition or of the facts which make it likely to be dangerous*.[8]

The installers did not deny that they were aware or should have been aware of the uncapped pipe and its dangers. They have not shown that plaintiffs were aware of what it was or what dangers it presented. Plaintiffs' expert witness, David Stayer, testified:

> [I]nstallers are hired because they have a certain level of knowledge and expertise . . . more than the homeowner has.
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> * * *
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> The majority of homeowners have very little . . . mechanical background to understand the ramifications of installing things in a certain procedure for safety's sake. They hire people to do this so that the device or the work that is done is done . . . in a proper workmanship-type way, and also so that it's mechanically safe and physically safe so that there's not going to be gas leaks, electrical arcs that

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[7] *Id*.

[8] *Id*. at 389-390 (emphasis added) (citation and quotation marks omitted).

> could cause problems with the devices or fires in the future. That's what they hire these people for.

In sum, the installers knew or should have known about the gas pipe and had no reason to believe that plaintiffs knew what it was. And they failed to inform plaintiffs of its danger before concealing it with the dryer. Accordingly, the relationship of the parties weighs heavily in favor of imposing a duty on the installers to warn plaintiffs of the danger associated with the uncapped gas line.[9]

The second criterion relevant to determining whether this duty exists is the foreseeability of the harm involved. In this regard, "[a] plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that *some* injury to the plaintiff was foreseeable or to be anticipated."[10] Here, plaintiffs' injuries resulting from the uncapped pipe were unquestionably foreseeable.

The National Fuel Gas Code highlights the foreseeable nature of an accident resulting from an uncapped

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[9] The majority claims that the fact that "[defendants] did not expressly agree to enter plaintiffs' premises for the purpose of inspecting the gas line" weighs against imposing a duty. *Ante* at 664 n 37. This claim is misleading. The installers were not contractually obligated to inspect the gas line, but they *were* contractually obligated to install the electric dryer. They did so in a location directly in front of the uncapped gas pipe without warning plaintiffs of the danger they had concealed. By undertaking to install the dryer, the installers assumed a duty to act in a reasonably prudent manner.

The majority similarly errs in its claim that because the installers did not lay hands on the gas pipe, they did not owe plaintiffs a legal duty with respect to it. See *ante* at 663-664. *Huhtala* explicitly held that a duty to act in a reasonable manner and protect a consumer arises "*apart from the terms of* [*a contract*]." *Huhtala*, 401 Mich at 130 (emphasis added).

[10] *Schultz*, 443 Mich at 452 n 7 (emphasis added).

gas pipe. The code addresses the safe installation and removal of gas piping systems, appliances, and equipment. It provides, in pertinent part:

> Each [gas] outlet, including a valve or cock outlet, shall be securely closed gastight with a threaded plug or cap immediately after installation and shall be left closed until the gas utilization equipment is connected thereto. Likewise, when the equipment is disconnected from an outlet and the outlet is not to be used again immediately, it shall be securely closed gastight.
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> * * *
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> The basic concept here is that a plug or cap closure is required for all gas openings. *Closing a valve is not enough to satisfy this requirement because the valve may be opened accidentally or by an unknowing person*. No temporary or makeshift closure is permitted because anything except a cap or proper plug could leak.[11]

The code makes clear that gas pipes must be capped to prevent accidents. Moreover, it advises that merely closing a valve is insufficient because the valve could be accidentally opened by a person unfamiliar with gas lines.

James Asaro, a former employee of defendant Exel Direct, Inc., gave deposition testimony that delivery drivers and installers like Pritchard and Dameron were provided extensive training. They were taught what to do when faced with installing an electric dryer in a space where a gas dryer had been removed and an uncapped gas pipe remained. Asaro specifically testified that installers were trained to ascertain that the valve for a gas line is turned off and then to either cap the open pipe or bolt it closed. As Asaro noted, an electric dryer installed so that it masks an uncapped gas pipe is

[11] National Fuel Gas Code, § 3.8.2, pp 78-79 (1996) (emphasis added).

an "accident waiting to happen." Consequently, plaintiffs have presented forceful evidence that the dangers of an uncapped gas pipe and the attendant risk of injury are entirely foreseeable. Plaintiffs have shown that, in this case, the risks were foreseeable to the installers.

The third criterion relevant to determining whether a duty exists is the burden on the defendant. The burden of verbally warning a homeowner of the dangers presented by an uncapped gas pipe before concealing it is minuscule. This factor also weighs heavily in favor of imposing a duty on the installers.

In sum, I would impose on the installers a simple duty to warn. I do not believe that the installers should be under a duty to investigate any and all potential hazards in plaintiffs' home. Rather, the scope of their duty should be limited to the area they occupied and in which they installed the electric dryer, which in this case contained the uncapped gas pipe. Their duty should not extend to areas in plaintiffs' home in which they did not work or that they did not even traverse. Nor should it extend to potential hazards unrelated to the dryer or its installation.

The final factor to consider when determining whether a duty exists is the nature of the risk presented. This factor also weighs in favor of imposing a duty to warn on defendants. We have recognized the potential risk posed by natural gas on numerous occasions, describing it as a "highly dangerous substance"[12] and recognizing that "[a]nyone dealing with this commodity, because of its dangerous propensities, must

[12] *Fleegar v Consumers Power Co*, 262 Mich 537, 544; 247 NW 741 (1933) ("A gas company, since it is dealing with a highly dangerous substance, is bound to use a degree of care commensurate with the danger of its gas escaping and causing injury or damage to the person or property of others.").

exercise such care for the safety of others . . . ."[13] Hence, the great danger presented by a gas leak warrants imposing a duty to warn on the installers.[14]

The majority considers the relationship of the parties and concludes that it does not weigh in favor of imposing a duty. It claims that because Marcy Hill was "aware of the pipes in the kitchen niche," she should have made "further inquiries regarding the nature of the pipes."[15] But it admits that Hill testified that she thought the pipe in question was a water line. Thus, she did not make further inquiries about it and was unaware that leaving it uncapped posed any danger of gas leakage. The pipe was invisible to her when it began to emit gas. She had no idea where the gas was coming from.[16]

The majority makes a leap of logic in concluding that because Hill knew that the pipe was there, she had

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[13] *Gadde v Mich Consol Gas Co*, 377 Mich 117, 126; 139 NW2d 722 (1966) ("As we have seen, gas has long been regarded as a dangerous substance. Anyone dealing with this commodity, because of its dangerous propensities, must exercise such care for the safety of others as a reasonably prudent man would exercise in the face of such potential danger.").

[14] The majority discusses *Girvan v Fuelgas Co*, 238 Mich App 703, 714; 607 NW2d 116 (1999), which held that a gas supplier has "a duty to ensure that its product is delivered safely to the exterior of the premises of the end user but, in the absence of an agreement to do otherwise, that duty does not extend to the inspection of the interior lines . . . ." *Ante* at 664 n 37. *Girvan* further noted that, "[c]ognizant of these risks, the reasonable person should seek expert assistance when dealing with dangerous commodities on the person's premises." *Girvan*, 238 Mich App at 714. The majority fails to recognize that plaintiffs *did* seek experts to install their electric dryer. Those experts were Pritchard and Dameron.

[15] *Ante* at 668.

[16] The majority claims that Hill could have capped or removed the gas line herself or called the gas company when she smelled gas. *Ante* at 667. This statement is wholly irrelevant to the question before us, which is whether the installers owed plaintiffs a legal duty in tort. These considerations would be relevant to a determination of comparative negligence and would arise only if this case were to proceed to trial.

constructive notice that it was dangerous. The record contains no evidence that plaintiffs were aware of the danger that the uncapped gas pipe posed. Indeed, knowledge of the existence of what Hill believed was a water line is entirely distinct from knowledge of the dangers of natural gas. The majority thus confuses plaintiffs' knowledge of the dangers of natural gas with plaintiffs' knowledge of the dangers of an uncapped gas line. There is no evidence that plaintiffs were aware of the danger of the uncapped pipe protruding from the wall of their laundry nook. Accordingly, the cases relied on by the majority holding that there is no duty to warn of a risk of which a person is constructively aware are inapposite.

DEFENDANTS OWED PLAINTIFFS A LEGAL DUTY NOT TO MAKE AN EXISTING DANGER WORSE

The majority next concludes that the installation of the electric dryer did not create a new dangerous condition or make an existing danger worse. Its analysis of this issue strains credibility.

In *Fultz v Union-Commerce Associates*, a majority of this Court held that a defendant's duty in tort must be separate and distinct from the defendant's duty in contract.[17] As discussed earlier, I would hold that the installers owed plaintiffs common law duties in tort that were separate and distinct from their contractual duties. *Fultz* identified one class of cases in which a contracting party would owe a duty separate and distinct from a contract—cases in which a defendant's conduct worsens an existing hazard.[18] Nothing in *Fultz*

[17] *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). I remain committed to my concurring opinion in *Fultz*. *Id*. at 470-476.

[18] *Id*. at 468-469.

undermines the general common law duty to act in a nonnegligent manner. Thus, *Fultz*'s analysis with respect to new dangerous conditions represents only one way in which a party can establish a duty separate and distinct from a contractual obligation. In this respect, *Fultz* is entirely consistent with *Loweke v Ann Arbor Ceiling & Petition Co, LLC*, which held that "a separate and distinct duty to support a cause of action in tort can arise by . . . the generally recognized common-law duty to use due care in undertakings . . . ."[19]

The installers undertook to install plaintiffs' electric dryer. Plaintiffs allege they were negligent in doing so. Thus, for purposes of that duty, it is entirely irrelevant whether their purported negligence worsened an existing hazard. The proper inquiry, as framed earlier, is whether the installers owed plaintiffs a general duty to act in a reasonable manner. This is because, irrespective of any alleged new hazard, they had a duty to use reasonable care when installing the dryer.[20]

However, under *Fultz*, the installers also owed plaintiffs a duty not to worsen an existing hazard. Their installation of the electric dryer concealed from view the uncapped gas pipe behind it. Thus, even if plaintiffs knew at some point that dangerous gas was escaping into their home, the source of that gas was concealed

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[19] *Loweke*, 489 Mich at 170.

[20] *Id.*; see also *Clark*, 379 Mich at 261 (1967) (stating that a duty "may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others"); *Ellis v McNaughton*, 76 Mich 237, 241; 42 NW 1113 (1989) ("But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts . . . .") (quotation marks and citation omitted).

from them. Plaintiffs' expert witness specifically testified that the installation increased the hazard to plaintiffs because they could no longer see the uncapped pipe. Plaintiffs' expert further explained that the installers should have advised plaintiffs that they could not proceed with the dryer's installation until the gas pipe was capped.

In sum, the installers owed plaintiffs a general common law duty to use due care when installing the electric dryer. This duty existed regardless of whether the installers' alleged negligence created a new hazard or increased the danger of an existing hazard. They also owed plaintiffs a duty not to worsen an existing hazard.

CONCLUSION

The majority concludes that the installers owed no legal duty to plaintiffs sounding in tort. This conclusion is fatally flawed because, in fact, the installers owed at least two tort-based duties.[21]

First, the majority opines that the installers owed no tort duty to plaintiffs because the parties' relationship was limited. This is incorrect. The parties had a relationship that required the installers to use due care when installing plaintiffs' electric dryer. As a consequence, in addition to their contractual duties, the installers had a common law duty to exercise reasonable safeguards to protect plaintiffs from harm. Accordingly, they had a duty to warn plaintiffs of the danger they encountered in plaintiffs' home in the spot where they installed the dryer and of which plaintiffs were ignorant.

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[21] The liability of the defendants is interrelated because the installers had an agency relationship with the defendants who sold and delivered the washer and dryer.

The majority suggests that plaintiffs were not ignorant of the danger of the gas pipe and that their knowledge of the danger of escaping gas justifies summary disposition for all defendants. Yet that conclusion depends entirely on imputing to plaintiffs knowledge of the danger, given that plaintiffs testified that they believed the pipe was a water pipe. The majority cites no authority for the proposition that knowledge of an uncapped water pipe is a sufficient basis to impute to someone knowledge that gas may escape from that pipe. I suspect no such authority exists. At best, what plaintiffs knew about the pipe is a factual question whose very existence prevents summary disposition. Second, the majority concludes that the installers did not make an existing condition more dangerous when they hid the uncapped gas pipe from view by installing the dryer in front of it. Thus, it postulates as perfectly credible that a hidden uncapped gas pipe poses not a whit more danger than one in plain view. Absent this highly questionable conclusion, the majority's finding of no duty cannot stand. The majority does not explain how it can be that the visible danger and the invisible danger are legally indistinguishable.

I would hold that the installers owed plaintiffs a common law duty to use due care when installing their electric dryer. This included warning plaintiffs of a danger in the spot where they installed the dryer and of which plaintiffs were ignorant. I would also hold that the installers owed a duty to plaintiffs not to worsen the danger represented by the uncapped gas pipe by obscuring it with a dryer. Accordingly, I respectfully dissent.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

PEOPLE v BROWN

Docket No. 143733. Argued April 5, 2012. Decided August 16, 2012.

Shawn Thomas Brown pleaded guilty in the Kalamazoo Circuit Court of second-degree home invasion, MCL 750.110a(3), as a second-offense habitual offender, MCL 769.10. He was not informed by the court, Gary C. Giguere, J., of his maximum possible sentence as an habitual offender before the plea was accepted. Rather, defendant had been informed that the maximum penalty for the home-invasion offense was 15 years in prison, but he was ultimately sentenced to a prison term of 6 years and 3 months to 22 years and 6 months in accordance with the habitual-offender enhancement. Defendant did not object at sentencing, but later moved to withdraw his plea or for resentencing, which the court denied. Defendant appealed. The Court of Appeals, CAVANAGH, P.J.,and SAAD, J. (GLEICHER, J., dissenting), denied defendant's application for leave to appeal in an unpublished order, entered August 22, 2011 (Docket No. 305047). The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 490 Mich 976 (2011).

In an opinion by Justice MARILYN KELLY, joined by Justices CAVANAGH, MARKMAN, HATHAWAY, and MARY BETH KELLY, the Supreme Court *held*:

Under MCR 6.302(B)(2), a trial court must apprise a defendant of his or her maximum possible sentence as an habitual offender before accepting a plea. If this procedure is not followed, the defendant may allow the plea and sentence to stand or withdraw the plea, in which case a court must vacate the defendant's conviction and sentence.

1. Under MCR 6.302(A), a defendant's guilty plea must be understanding, voluntary, and accurate. For it to be understanding, MCR 6.302(B)(2) requires the trial court to advise the defendant before accepting his or her plea of the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law. A guilty plea is involuntary if the defendant pleading guilty is not informed of the maximum sentence that could be imposed.

2. The habitual-offender statutes, MCL 769.10 *et seq.*, allow the enhancement of a defendant's sentence on the basis of his or her prior felonies, but do not create a substantive offense independent of the principal charge. When a defendant is subject to an enhanced sentence as an habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2). The Court of Appeals' decision in *People v Boatman*, 273 Mich App 405 (2006), which held to the contrary, is overruled. To hold otherwise would allow a defendant to plead guilty without knowing the true consequences of his or her plea, which in turn would prevent the defendant from making an understanding plea.

3. There was a clear defect in the plea proceeding in this case, and defendant's plea was not an understanding plea as required by MCR 6.302(B)(2) because he was not properly informed of the potential maximum sentence for second-degree home invasion as enhanced by his second-offense habitual-offender status before his plea was accepted.

4. The remedy for a violation of MCR 6.302(B)(2) is set forth in MCR 6.310(C), which provides that when there is a defect in the plea-taking process, the defendant may either allow the plea and sentence to stand or withdraw the plea, in which case the trial court must vacate the defendant's conviction and sentence. In the latter event, the matter may proceed to trial. The remedy set forth in MCR 6.310(C) also applies when the defendant is not notified by the prosecution of an habitual-offender sentence enhancement until after pleading guilty, as allowed by MCL 769.13(3).

Remanded for further proceedings.

Chief Justice YOUNG, joined by Justice ZAHRA, concurring in part and dissenting in part, agreed with the majority that MCR 6.310(C) provides the sole remedy for violations of MCR 6.302(B)(2). In accordance with his prior dissenting statement in *Boatman*, however, Chief Justice YOUNG would have held that MCR 6.302(B)(2) does not require a trial court to inform a defendant of the maximum possible sentence following enhancement resulting from the defendant's status as an habitual offender. The true maximum sentence for second-degree home invasion is that described in MCL 750.110a(6), the statute that defines the offense. Accordingly, defendant's plea was valid because the trial court accurately informed him that the maximum possible sentence for the offense was 15 years in prison.

CRIMINAL LAW — GUILTY PLEAS — UNDERSTANDING PLEAS — SENTENCES — HABITUAL-OFFENDER ENHANCEMENTS — WITHDRAWAL OF PLEAS AFTER SENTENCING.

Under MCR 6.302(A), a defendant's guilty plea must be understanding, voluntary, and accurate; under MCR 6.302(B)(2), the trial court must advise the defendant before accepting the pleas of the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law; the habitual-offender statutes, MCL 769.10 *et seq*, allow for a defendant's sentence to be enhanced on the basis of his or her prior felonies; when a defendant is subject to an enhanced sentence as an habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2), and a trial court must apprise the defendant of his or her maximum possible sentence as an habitual offender before accepting the guilty plea; the remedy for a violation of MCR 6.302(B)(2) is set forth in MCR 6.310(C), which provides that when there is a defect in the plea-taking process, the defendant may either allow the plea and sentence to stand or withdraw the plea, in which case the trial court must vacate the defendant's conviction and sentence; in the latter event, the matter may proceed to trial.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jeffrey R. Fink*, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne M. Yantus*) for defendant.

MARILYN KELLY, J. This criminal law case involves a defendant who was not informed of the maximum sentence that could be imposed on him before he pleaded guilty. MCR 6.302(B)(2) requires that the court notify a defendant of the maximum possible prison sentence. Defendant pleaded guilty of second-degree home invasion as a second-offense habitual offender, but the trial court never advised him of his maximum possible sentence as an habitual offender. We ordered oral argument on defendant's application for leave to appeal to determine if the

court rule requires such notice.[1] We also asked the parties to address what relief, if any, is available to a defendant under the circumstances of this case.[2]

We hold that MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before accepting a guilty plea. Because defendant in this case was not so apprised, his guilty plea was defective. We also hold that MCR 6.310(C) provides the sole remedy available to a defendant in these circumstances. Hence, pursuant to MCR 6.310(C), defendant may allow his plea and sentence to stand or withdraw his plea, in which case the court shall vacate his conviction and sentence. In the latter event, the matter may proceed to trial. Accordingly, we remand this case to the trial court for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant conspired with his girlfriend to rob her employer's home. He stole $10,300 worth of coins, currency, and guns from the unlocked home and shared the proceeds with her. He was apprehended and charged with second-degree home invasion,[3] larceny of a firearm,[4] being a felon in possession of a firearm,[5] and larceny in a building[6] as a fourth-offense habitual offender.[7]

Defendant pleaded guilty as a second-offense habitual offender[8] to second-degree home invasion in

[1] *People v Brown*, 490 Mich 976 (2011).

[2] *Id*.

[3] MCL 750.110a(3).

[4] MCL 750.357b.

[5] MCL 750.224f.

[6] MCL 750.360.

[7] MCL 769.12.

[8] MCL 769.10.

exchange for dismissal of the other charges. At his plea hearing, the trial judge explained the maximum sentence, advising him that second-degree home invasion "is a felony; it is punishable by up to 15 years in the state prison. Do you understand?" Defendant confirmed that he understood. The judge sentenced him to a prison term of 6 years and 3 months to 22 years and 6 months and ordered him to pay restitution.[9] He did not object to the maximum sentence.

Defendant later moved to withdraw his plea or for resentencing. He argued that he should be resentenced without the habitual-offender enhancement because the trial judge had failed to advise him of the enhanced maximum sentence before taking the guilty plea. The judge denied the motion, relying on *People v Boatman*[10] and declining to decide whether various orders of this Court[11] had impliedly overruled *Boatman*.

The Court of Appeals denied defendant's application for leave to appeal in a split decision; Judge GLEICHER would have granted the application. Defendant applied for leave to appeal in this Court, and we ordered and heard oral argument on whether to grant the application or take other action.[12]

STANDARD OF REVIEW AND LEGAL BACKGROUND

This Court reviews for an abuse of discretion a trial court's ruling on a motion to withdraw a plea.[13] A defendant pleading guilty must enter an understand-

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[9] Defendant's challenge to the order of restitution is not before this Court and will not be discussed.

[10] *People v Boatman*, 273 Mich App 405; 703 NW2d 251 (2006).

[11] See *People v Ruffin*, 488 Mich 891 (2010), and *People v Lofton*, 488 Mich 924 (2010).

[12] *Brown*, 490 Mich 976.

[13] *People v Lang*, 381 Mich 393, 398-399; 162 NW2d 143 (1968).

ing, voluntary, and accurate plea.[14] MCR 6.302(B)(2) states that for a plea to be understanding, the defendant must be informed of "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law[.]"

The habitual-offender statutes, MCL 769.10 *et seq*., provide enhancement of a defendant's sentence on the basis of prior felony convictions. They do not create a substantive offense independent of the principal charge. "Rather, it is a sentence-enhancement procedure with a deterrent and punitive purpose."[15] Under MCL 769.13(3), the prosecution is permitted to file notice of an habitual-offender enhancement after a defendant pleads guilty.[16]

This Court has never determined whether, in order to comply with MCR 6.302(B)(2), a trial court must inform a defendant of the maximum possible enhanced sentence before taking a guilty plea. The question was

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[14] MCR 6.302(A).

[15] *People v Oswald (After Remand)*, 188 Mich App 1, 12; 469 NW2d 306 (1991); see *People v Kade*, 486 Mich 978, 981; 783 NW2d 102 (2010) (MARILYN KELLY, C.J., concurring), citing *Oswald*.

[16] MCL 769.13(3) provides that

> [t]he prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1).

MCL 769.13(1) contains additional time restrictions for seeking a sentence enhancement under the habitual-offender statutes and requires the prosecuting attorney to file "a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense."

presented six years ago in *People v Boatman*.[17] In that case, the defendant pleaded guilty of resisting and obstructing a police officer as a fourth-offense habitual offender. The plea agreement required him to be sentenced within the sentencing guidelines.

The trial court informed Mr. Boatman that his maximum sentence would be two years' incarceration, the correct sentence for an unenhanced charge of resisting and obstructing a police officer. With enhancement, however, the maximum sentence was 15 years. Boatman was eventually sentenced to 3 to 15 years in prison. He unsuccessfully moved the trial court to set aside his plea, and the Court of Appeals denied him leave to appeal. This Court remanded the case to the Court of Appeals as on leave granted for consideration of whether the defendant's plea was understanding.[18]

On remand, in a split, published decision, the Court of Appeals held in *Boatman* that MCR 6.302(B)(2) requires the trial court to inform a defendant of only the maximum sentence for the underlying offense. It does not require that he or she be informed before pleading guilty of the enhancement created by habitual-offender status. The Court concluded that Boatman

> was informed of the maximum sentence for the charged "offense," because "[t]he habitual-offender statute does not create a substantive offense that is separate from and independent of the principal charge." Nothing in the wording of the court rule can be construed to require a trial court to address every possible configuration or consequence of sentencing. In accordance with the dictates of MCR 6.302(B)(2), when pleading guilty, the court rule requirement that a defendant be advised of the consequences of his or her plea does not encompass advice

[17] *People v Boatman*, 475 Mich 862 (2006).

[18] *Id*.

> extending beyond the maximum possible sentence and any mandatory minimum sentence necessitated by law. [19]

The *Boatman* Court recognized that MCR 6.302 "requires a defendant to be informed of the consequences of his or her plea and, necessarily, the resultant sentence."[20] Nonetheless, it concluded that MCR 6.302 does not require notification of the enhanced sentence, even though this conclusion violated the intent of the rule. No appeal was taken from the decision.

Concurring in the result only in *Boatman*, Judge SERVITTO would have required trial courts to advise a defendant of the maximum sentence as enhanced by his or her habitual-offender status. She reasoned that this status directly affects the possible maximum sentence for the underlying offense, and she opined that "[w]here a defendant's habitual-offender status leads to no separate sentence, such status could only be viewed as part and parcel of the charged crime."[21]

This Court has since expressed disapproval with the holding of *Boatman*. In *People v Kade*, in a statement joined by Justices CAVANAGH, MARKMAN, and HATHAWAY. I wrote that *Boatman* should be overruled.[22] Since *Kade* was decided, two decisions of this Court have suggested that *Boatman* is no longer good law without expressly overruling it.

In *People v Ruffin*, the defendant was incorrectly told that his maximum enhanced sentence was 30 years' imprisonment.[23] In reality, as a third-offense habitual offender, the defendant was subject to a maximum of 40

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[19] *Boatman*, 273 Mich App at 407-408 (citation omitted).

[20] *Id*. at 409.

[21] *Id*. at 414 (SERVITTO, J., concurring in result only).

[22] *Kade*, 486 Mich at 981-982 (MARILYN KELLY, C.J., concurring).

[23] *Ruffin*, 488 Mich at 891.

years in prison. This Court vacated the sentence and remanded the case to the trial court to allow the defendant to withdraw his plea or be resentenced to no more than 30 years' imprisonment. We noted, in support of our determination to allow the defendant to be resentenced to the unenhanced sentence, that the prosecution had conceded that it was the appropriate remedy.[24]

Similarly, in *People v Lofton*,[25] the defendant was an habitual offender and was not informed of the enhanced possible maximum sentence before he pleaded guilty. The trial court told him that a felony-firearm conviction would result in a 2-year prison sentence. However, at sentencing, the court imposed a 5-year enhanced sentence as required by statute.[26] The defendant did not object. We remanded the case to the trial court to allow him to withdraw his plea or be resentenced to a 2-year sentence of imprisonment on the felony-firearm conviction.[27]

Plea withdrawals after sentencing are governed by MCR 6.310(C), which provides:

> Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. *If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea*. If the

[24] *Id*.

[25] *Lofton*, 488 Mich at 924.

[26] MCL 750.227b(1).

[27] *Lofton*, 488 Mich at 924.

> defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.[28]

A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.[29]

THE PROPER INTERPRETATION OF MCR 6.302(B)(2) AND ITS APPLICATION

In its decision in *Boatman*, the Court of Appeals accurately stated that "an important focus of MCR 6.302 is to ensure that any defendant who has entered into a sentencing agreement has made a knowing, understanding, and informed plea decision."[30] It also noted that "[t]his requires a defendant to be informed of the consequences of his or her plea and, necessarily, the resultant sentence."[31] Nevertheless, the Court of Appeals refused to grant relief because the language of MCR 6.302(B)(2) does not specifically require that an habitual offender be advised regarding the effect habitual-offender status has on sentencing.[32]

We disagree with *Boatman* and overrule that decision. MCR 6.302(B)(2) states that the trial court "must advise the defendant . . . and determine that each defendant understands . . . the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law[.]" We hold that, before pleading guilty, a defendant must be notified of the maximum possible

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[28] Emphasis added.

[29] *People v Montrose (After Remand)*, 201 Mich App 378, 380; 506 NW2d 565 (1993).

[30] *Boatman*, 273 Mich App at 409.

[31] *Id*.

[32] *Id*.

prison sentence with habitual-offender enhancement because the enhanced maximum becomes the "maximum possible prison sentence" for the principal offense.

By not telling a defendant the potential maximum sentence because of his or her habitual-offender status, "a trial court is not advising of the 'true' potential maximum sentence."[33] Today's holding accurately reflects the intent of MCR 6.302(B)(2), which is that a defendant be informed beforehand of the maximum sentence that would follow his or her plea of guilty.[34]

In the case before us, there was a clear defect in the plea proceedings. Because defendant was not accurately informed of the consequences of his plea as a second-offense habitual offender, he was not able to make an understanding plea under MCR 6.302(B).[35] We must thus decide what remedies are available to him.

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[33] *Boatman*, 273 Mich App at 414 (SERVITTO, J., concurring in result only).

[34] The concurrence/dissent contends that

> the court rule actually and explicitly requires only that the court inform a defendant of the maximum possible prison sentence *for the offense* to which the defendant pleads guilty and does not require the court to inform a defendant of the possible sentencing enhancement resulting from his status as an habitual offender.

Post at 702. However, as was explained in *Kade*, "an habitual offender supplement is not a separate offense," and thus "it logically follows that it must be linked to, or considered one with, the underlying offense. As such, to comply with MCR 6.302(B)(2), a defendant must be made aware of the consequences of 'the offense' including any habitual offender enhancement." *Kade*, 486 Mich at 981 (MARILYN KELLY, C.J., concurring).

[35] We note that *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012) supports our holding that the plea defendant entered was defective. There, the defendant was not informed before pleading guilty to second-degree criminal sexual conduct that he was required to be placed on lifetime electronic monitoring pursuant to MCL 750.520c(2)(b). We held that "the 'understanding, voluntary, and accurate' components of [MCR

THE PROPER REMEDY FOR A VIOLATION OF MCR 6.302(B)

We determined in 1981 in *People v Jones* that a failure to advise a defendant of the maximum possible prison sentence before taking a guilty plea constitutes an error requiring reversal.[36] This Court required the trial court to set aside the defendant's plea-based convictions.[37] We reaffirm that holding today while incorporating MCR 6.310(C) to permit the defendant to elect

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6.302(A)] are premised on the requirements of constitutional due process, which might not be entirely satisfied by compliance with [MCR 6.302(B) through (D).]" *Id*. at 332.

The voluntariness requirement mandates that a defendant entering a plea be "fully aware of the direct consequences" of the plea. *Brady v United States*, 397 US 742, 755; 90 S Ct 1463; 25 L Ed 2d 747 (1970). "The most obvious 'direct consequence' of a conviction is the penalty to be imposed," thus requiring that a defendant be notified of the sentence he or she will be forced to serve because of the plea. *Blankenship v State*, 858 SW2d 897, 905 (Tenn, 1993). It is therefore apparent that habitual-offender enhancement is a direct consequence of pleading guilty because it affects the defendant's sentence. Thus, a defendant must be fully aware of the consequences of that enhancement before pleading guilty.

Additionally, in *Cole*, 491 Mich at 334 we noted that the determination of whether a statute imposes punishment can begin and end with a finding that the legislative purpose was to impose punishment. See *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). Our courts have consistently concluded that the habitual-offender statutes provide "a sentence-enhancement procedure with a deterrent and punitive purpose." *Oswald*, 188 Mich App at 12. Following the *Smith v Doe* paradigm, we conclude that an habitual-offender sentence enhancement constitutes a "direct" consequence of a guilty or no-contest plea and thus requires notice before a plea is taken. *Id.* at 12; see *Boatman*, 475 Mich 862, 862-863 (2006) (YOUNG, J., dissenting).

[36] *People v Jones*, 410 Mich 407, 411; 301 NW2d 882 (1981). In *People v Jackson*, 417 Mich 243, 246; 334 NW2d 371 (1983), this Court limited the application of *Jones*. It held that automatic reversal is not required for a failure to give advice concerning the mandatory minimum and maximum sentences if the defendant is sentenced pursuant to a sentencing agreement.

[37] *Jones*, 410 Mich at 412.

either to allow the plea and sentence to stand or to withdraw the plea. A brief review of the history underlying the holding in *Jones* is instructive.

In 1974, in *People v Shekoski*,[38] we adopted a "strict adherence" requirement for procedures governing the acceptance of guilty pleas.[39] Our order in that case stated "that strict adherence to those requirements is mandatory and that neither substantial compliance nor the absence of prejudicial error will be deemed sufficient."[40]

The next year, in *Guilty Plea Cases*, we renounced *Shekoski* and adopted a "substantial compliance" test for errors in plea proceedings.[41] However, we retained a rule that required reversal for failure to provide advice concerning the maximum possible sentence and any mandatory minimum term.[42]

In *Guilty Plea Cases*, a defendant was informed that by pleading guilty of armed robbery, he was subject to a possible sentence of "up to life." But he was not advised that he might be ineligible for probation.[43] We recog-

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[38] *People v Shekoski*, 393 Mich 134; 224 NW2d 656 (1974).

[39] This court first adopted these procedures in 1973. 389 Mich lv-lvii. They are currently set forth in MCR 6.302.

[40] *Shekoski*, 393 Mich at 134.

[41] *Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975) ("Whether a particular departure from Rule 785.7 [now MCR 6.302] justifies or requires reversal or remand for additional proceedings will depend on the nature of the noncompliance.").

[42] *Id*. at 117-118. In addition, the Court retained a rule of automatic reversal for the failure to provide advice concerning three matters: (1) the presumption of innocence, (2) the consequences of a plea on probation or parole, and (3) the rights set forth in *People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972): the right to a jury trial, the right to confront one's accusers, and the right to remain silent. *Guilty Plea Cases*, 395 Mich at 118-121.

[43] *Id*. at 118.

nized that the precursor of MCR 6.302(B)(2)[44] "[did] not require the judge to inform the defendant of all sentence consequences—only the maximum sentence, any mandatory minimum," and "the possible effect on [the defendant's] status as a probationer or parolee."[45] We concluded that a failure to impart the information required by MCR 6.302(B)(2) continues to require reversal.[46]

In 2001, in the case of *People v Saffold*,[47] we elaborated on the substantial-compliance doctrine. Both the majority and the dissent agreed that automatic reversal is not required when a trial court fails to advise a defendant that, by pleading guilty, he or she waives the right to be presumed innocent. Both agreed also that "substantial compliance with MCR 6.302, with regard to the right to be presumed innocent, is all that is required," although the majority and dissent did not agree about the application of the substantial-compliance doctrine in that case.[48] *Saffold* is not applicable here, however, because it involved only rights that

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[44] When a criminal defendant stated his intent to plead guilty or to plead nolo contendere, GCR 1963, 785.7(1)(b) stated that the trial court

> shall not accept a plea of guilty or nolo contendere without first personally addressing the defendant and informing him of and determining that he understands the following.
>
> * * *
>
> (b) the maximum sentence and the mandatory minimum sentence, if any, for the offense to which the plea is offered.

[45] *Guilty Plea Cases*, 395 Mich at 118.

[46] *Id*. We note that *Guilty Plea Cases* predates our adoption of MCR 6.310(C).

[47] *People v Saffold*, 465 Mich 268, 271, 278-280, 287; 631 NW2d 320 (2001).

[48] *Id*. at 287 (MARKMAN, J., dissenting).

a defendant gives up by not going to trial[49] and the effect of a guilty plea on those rights.

The distinctions we have drawn are supported by our court rules, which differentiate a defendant's trial rights from the consequences of a guilty plea on a defendant's sentence. For example, MCR 6.302(B)(5) allows a written waiver of the trial rights found in MCR 6.302(B)(3). It does not, however, allow a written waiver of the requirement under MCR 6.302(B)(2) that is involved in the current case. Because trial rights and sentencing consequences are distinct, *Saffold* does not apply to our analysis of MCR 6.302(B)(2). And it does not apply to how the statute relates to a defendant's right to be informed of his or her maximum possible prison sentence.

We continue to recognize the distinction we drew in *Guilty Plea Cases* between information about a defendant's trial rights and information about a defendant's sentence. We note that MCR 6.310(C) now provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea.

Additionally, we are not alone in concluding that the failure to inform a defendant of the maximum sentence that could be imposed before he or she pleads guilty renders a plea involuntary.[50] Caselaw supports this

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[49] See MCR 6.302(B)(3). These rights include the right (a) to be tried by a jury, (b) to be presumed innocent until proved guilty, (c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty, (d) to have the witnesses against the defendant appear at the trial, (e) to question the witnesses against the defendant, (f) to have the court order any witnesses the defendant has for the defense to appear at the trial, (g) to remain silent during the trial, (h) to not have that silence used against the defendant, and (i) to testify at the trial if the defendant wants to testify. *Id*.

[50] See, e.g., *King v Dutton*, 17 F3d 151, 154 (CA 6, 1994).

determination and holds that an involuntary plea violates the state and federal Due Process Clauses.[51] For the reasons stated earlier, we hold that defendant entered a defective plea because it was not an understanding plea under MCR 6.302(B)(2). We remand this matter to the trial court so that defendant may be afforded the remedy provided in MCR 6.310(C), which provides in pertinent part:

> If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.

Because defendant was not informed of his maximum possible enhanced prison sentence before he pleaded guilty, he is entitled to the remedy provided by MCR 6.310(C). Thus, we remand this case to the trial court. On remand, defendant must be given the option of allowing his plea and sentence to stand or of withdrawing his plea. If the plea is withdrawn, the trial court must vacate his conviction and sentence and the matter may proceed to trial.

We reject defendant's argument that he is entitled to be resentenced in accordance with the unenhanced maximum sentence of which he was informed at the plea hearing. We hold that MCR 6.310(C) provides the proper remedy for violations of MCR 6.302(B)(2). It requires that a defendant be informed of the maximum enhanced sentence before being given the opportunity to elect (1) to allow his plea and sentence to stand or (2) to withdraw it. Resentencing a defendant to a term

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[51] See *McCarthy v United States*, 394 US 459, 466; 89 S Ct 1166; 22 L Ed 2d 418 (1969); *People v Schluter*, 204 Mich App 60, 66; 514 NW2d 489 (1994); see also US Const, Ams V and XIV; Const 1963, art 1, § 17.

within the range the court articulated at an erroneous plea hearing might lead to unfair results. It might create a binding "pleaded to" sentence to which neither the prosecution nor the defendant agreed.

Moreover, resentencing would modify an otherwise valid sentence. As we have said throughout this opinion, the *plea procedure* was defective here because defendant was not notified of his maximum possible sentence under MCR 6.302(B)(2). On the other hand, the *sentence* fell within the guidelines for a second-offense habitual offender and is presumed accurate "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."[52]

Thus, the remedy employed today differs from that used in *Ruffin* and *Lofton*. *Ruffin* is particularly distinguishable from the present action because there the prosecution conceded that the proper remedy was to resentence the defendant to the erroneous sentence discussed at the plea hearing.[53] Less than a month later

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[52] MCL 769.34(10). See *People v Francisco*, 474 Mich 82, 88, 92; 711 NW2d 44 (2006) (remanding for resentencing under MCL 769.34(10) because of an incorrect scoring of the statutory sentencing guidelines). Defendant erroneously relies on *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), to argue that he should be resentenced at the unenhanced maximum sentence for second-degree home invasion. Where an error in the judgment of sentence rendered the sentence inconsistent with the sentence the court intended, we have ordered that the judgment of sentence be amended. *People v Littleton*, 490 Mich 910; 805 NW2d 203 (2011). Similarly, when a *Cobbs* evaluation was within the sentencing guidelines range but the range was inaccurate because of a scoring error, we have ordered resentencing. In those cases, we have given the sentencing court the discretion either to adhere to the *Cobbs* evaluation or allow the defendant to withdraw the plea. See *People v Spencer*, 477 Mich 1086; 729 NW2d 225 (2007). These *Cobbs* cases are not applicable to the case at hand because there are no sentencing errors or errors in the judgment of sentence.

[53] *Ruffin*, 488 Mich at 891.

we employed the same remedy in *Lofton*, in which there was no indication that the prosecution conceded to the remedy.[54] To the extent that the orders in *Ruffin* and *Lofton* are inconsistent with this opinion, they are overruled.

In *Kade*, we noted that an arguable conflict exists between MCR 6.302(B)(2) and MCL 769.13(3). The statute permits a prosecuting attorney to file a notice of intent to seek an enhanced sentence under the habitual-offender statute after a defendant has entered a plea.[55] This Court did not amend MCR 6.302(B)(2) to resolve the tension between the court rule and the statute. But the remedy provided by MCR 6.310(C) will apply when a defendant is not notified of the enhancement until after pleading guilty. MCR 6.302 requires a voluntary and understanding plea. Hence, the concerns about a defendant understanding the consequences of a guilty plea are present when the defendant is notified of possible sentence enhancement only after pleading guilty. Just as in the case at hand, a defendant's right to make an understanding plea is of the utmost importance in that circumstance.

CONCLUSION

MCR 6.302(B) specifically gives defendants who plead guilty of a crime the right to know beforehand the maximum possible sentence that will result from their plea. We hold that when a defendant is subject to an enhanced sentence as an habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2). Accordingly, we overrule the Court of Appeals' decision in *Boatman*. To

[54] *Lofton*, 488 Mich at 924.

[55] *Kade*, 486 Mich at 981-982 (MARILYN KELLY, C.J., concurring).

hold otherwise would allow a defendant to plead guilty without knowing the true consequences of his or her plea. It would also prevent the defendant from making an understanding plea.

We also hold that MCR 6.310(C) provides the remedy for this violation of MCR 6.302(B)(2). Because the defendant in this case was not given the required sentence-enhancement notice, we remand the case to the trial court. Pursuant to MCR 6.310(C), defendant may allow his plea and sentence to stand or withdraw his plea, in which case the trial court must vacate his conviction and sentence. In the latter event, the matter may proceed to trial. We do not retain jurisdiction.

CAVANAGH, MARKMAN, HATHAWAY, and MARY BETH KELLY, JJ., concurred with MARILYN KELLY, J.

YOUNG, C.J. (*concurring in part and dissenting in part*). For the reasons I have previously stated in *People v Boatman*,[1] I dissent in part from the majority opinion. Despite the majority's claimed "intent" regarding MCR 6.302(B), the court rule actually and explicitly requires only that the court inform a defendant of the maximum possible prison sentence *for the offense* to which the defendant pleads guilty and does not require the court to inform a defendant of the possible sentencing enhancement resulting from his status as an habitual offender. The "true" maximum possible prison sentence for the offense of second-degree home invasion is as described in MCL 750.110a(6)—"[h]ome invasion in the second degree is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $3,000.00, or both." Defendant was accurately informed

[1] *People v Boatman*, 475 Mich 862, 862-863 (2006) (YOUNG, J., dissenting).

of the sentence for the offense to which he pleaded guilty, and in my view, the sentence meted out was valid in all respects.

While I disagree that there was a violation of MCR 6.302(B)(2), I do agree with the majority on the remedy when such a violation occurs. I concur, therefore, with that portion of the majority opinion holding that the MCR 6.310(C) provides the *sole* remedy for violations of MCR 6.302(B)(2) when a defendant seeks to withdraw his plea after sentencing. This Court's orders in *People v Ruffin*[2] and *People v Lofton*[3] erroneously permitted the option of specific performance of the unenhanced maximum sentence in contravention of the plain language of the court rule and should not be viewed as having amended the court rule *sub silentio*. Thus, "[i]f the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside," the court is required to "give the advice or make the inquiries necessary to rectify the error," but the defendant's options are *limited to* "elect-[ing] to allow the plea and sentence to stand or to withdraw[ing] the plea."[4]

Aside from the fact that the court rule does not provide for it, several considerations militate against permitting a defendant to be resentenced to the unenhanced maximum sentence.

First, if there is a consequential defect in the plea taking proceedings, the validity of the plea itself is called into question. MCR 6.302(A) indicates that a trial court may not accept a guilty plea unless it is "convinced that the plea is understanding, voluntary, and

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[2] *People v Ruffin*, 488 Mich 891 (2010).

[3] *People v Lofton*, 488 Mich 924 (2010).

[4] MCR 6.310(C).

accurate." Moreover, the United States Supreme Court has stated that "a plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.' "[5] If a defendant's guilty plea was not an understanding plea, permitting a defendant his preferred remedy of being resentenced to an unenhanced sentence does nothing to cure the invalidity of the underlying guilty plea.

Second, permitting a defendant to be resentenced assumes that the information concerning the unenhanced sentence given by the trial court was a term of the plea bargain agreement, rather than simply incomplete information. In this case, defendant was charged with second-degree home invasion,[6] larceny of a firearm,[7] being a felon in possession of a firearm,[8] and larceny in a building[9] as a fourth-offense habitual offender.[10] Defendant pleaded guilty to second-degree home invasion as a second-offense habitual offender[11] in exchange for the dismissal of the remaining charges and an agreement by the prosecutor not to charge defendant with possession of a firearm during the commission of a felony.[12] At the plea proceeding, defendant indicated that these terms were his *complete* understanding of the plea bargain agreement. Only later was defendant informed that the maximum possible prison sentence for second-degree home invasion was 15 years.

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[5] *Bousley v United States*, 523 US 614, 618; 118 S Ct 1604; 140 L Ed 2d 828 (1998) (citation omitted).

[6] MCL 750.110a(3).

[7] MCL 750.357b.

[8] MCL 750.224f.

[9] MCL 750.360.

[10] MCL 769.12.

[11] MCL 769.10.

[12] MCL 750.227b.

Thus, at the time the plea was entered, neither the parties nor the trial court believed that defendant was tendering his guilty plea in exchange for the trial court's preliminary agreement to relinquish its discretion to enhance defendant's sentence as a habitual offender. While I do not believe that the advice given was erroneous, deeming it to be a term of the plea agreement *after the fact* (in essence, a de facto *Cobbs*[13] agreement) substantially alters the negotiated plea agreement in contravention of the intent of all concerned at the time the plea was originally tendered.

Moreover, even when there is a *genuine Cobbs* agreement and a defendant's guilty plea is made in exchange for a specific sentence disposition by the trial court, the defendant's remedy is limited to withdrawing his guilty plea if the court is unable to sentence the defendant as stated. Under MCR 6.310(B)(2)(b), a defendant is *not* entitled to specific performance of a *Cobbs* agreement. Thus, permitting the remedy of specific performance when a defendant who is an habitual offender is allegedly incorrectly advised regarding the unenhanced maximum sentence provides that defendant *with a greater remedy* than he would have been entitled to if the unenhanced maximum sentence had been an *explicit* term of the plea agreement. Defendant's counsel has proffered no reason to support such an enhanced benefit, and I certainly cannot divine a justification for why defendant should be entitled to receive it.

Finally, assuming that the allegedly incomplete information was a term of the plea agreement, permitting defendant the remedy of being resentenced to the unenhanced maximum sentence would essentially permit the trial court to change its mind regarding the exercise of the court's sentencing discretion, disregard

[13] See *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

all the negative information that convinced the court to enhance the defendant's sentence in the first place,[14] and allow the modification of a valid sentence. MCR 6.429(A) states that a court may correct an invalid sentence, but may not modify a valid sentence after it has been imposed. I agree with the majority that defendant's sentence of 75 to 270 months for second-offense degree home invasion, as enhanced by his second-offense habitual offender status, is perfectly valid. The infirmity lies, if anywhere, with the plea colloquy.

Because I believe that MCR 6.302(B) does not require the trial court to inform a defendant of his maximum possible prison sentence as enhanced by his status as a habitual offender, I respectfully dissent. I concur, however, that MCR 6.310(C) provides the sole remedy for violations of MCR 6.302(B)(2) when a defendant seeks to withdraw his plea after sentencing.

ZAHRA, J., concurred with YOUNG, C.J.

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[14] At sentencing, the trial court stated:

> I read the Presentence Report. . . I read the Victim Impact Statement. I listened to counsel and [defendant] in court.
>
> You're 31 years of age, six felonies, five prior misdemeanors. This case involves entering into, obviously without permission, the home of another person to steal guns, coins, cash.
>
> I think [the probation officer] wrote a fairly clear report. And his description of your interactions and your background, there's a striking contrast between what he describes and how you present yourself in Court, how you've presented yourself in Court before. He describes you as violent, unpredictable, less than convincing, a manipulator, does not like being confronted about his lack of motivation. *This report does indicate very little of a positive nature for this Court to rely on.*
>
> *You ask for a fair and lenient sentence . . . in this case. Those things are inconsistent because a lenient sentence would not be fair, it would not be just.*

ATKINS v SUBURBAN MOBILITY AUTHORITY
FOR REGIONAL TRANSPORTATION

Docket No. 140401. Argued March 7, 2012. Decided August 20, 2012. Rehearing denied, 493 Mich 877.

Vivian Atkins brought an action in the Wayne Circuit Court against the Suburban Mobility Authority for Regional Transportation (SMART), seeking damages in tort for injuries she suffered while riding on a bus operated by SMART that was involved in an accident. Plaintiff had filed an application for no-fault benefits with defendant's insurer 10 days after the accident, but waited more than 7 months to notify defendant that she might pursue a tort action. The court, Kathleen Macdonald, J., granted defendant's motion for partial summary disposition, concluding that plaintiff had given notice of her injury but had failed to give defendant notice of her tort claims within 60 days of the accident as required by the notice provision of the Metropolitan Transportation Authorities Act, MCL 124.419. The Court of Appeals, FORT HOOD, P.J., and SAWYER and DONOFRIO, JJ., reversed in an unpublished opinion, issued October 22, 2009 (Docket No. 288461), concluding that plaintiff's no-fault claim and information plaintiff had supplied to defendant and its insurer were sufficient to give defendant notice of a third-party tort claim. The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 489 Mich 958 (2011).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Notice of a plaintiff's application for first-party no-fault benefits does not constitute written notice of a third-party tort claim sufficient to comply with MCL 124.419.

1. Under MCL 124.419, a claim brought against a transportation authority in derogation of governmental immunity must be presented as an ordinary claim against the common carrier involved. Any judgment is payable from funds of the authority, and jurisdiction is limited to those courts in the counties where the authority carries on its functions.

2. Written notice of an ordinary claim involving injury to persons or property must be served on the authority within 60 days of the occurrence through which the injury occurred. The term "ordinary claims" includes traditional tort claims arising out of occurrences involving a common carrier through which injury is sustained. A claim for no-fault benefits is not an ordinary claim for purposes of MCL 124.419 because it is not a tort claim and is not paid from the authority's funds, as traditional tort claims are, but is paid by a carrier's no-fault insurer. An application for no-fault benefits is qualitatively distinct in nature from a claim for third-party tort benefits, so that notice of one does not serve as notice of the other. First-party no-fault benefits are recoverable without regard to fault, unlike tort liability, which involves an adversarial process in which the plaintiff must prove fault to recover.

3. The Court of Appeals erred by holding that plaintiff's no-fault application, coupled with her communications with defendant or its insurer concerning her medical condition, sufficed to satisfy the 60-day notice requirement of MCL 124.419. There is no aspect of substantial compliance to the statutory notice requirement. Actual written notice of an ordinary claim for personal injury is required by the notice requirement of MCL 124.419. The circuit court properly granted defendant partial summary disposition because plaintiff failed to provide defendant written notice of her tort claims within 60 days from the occurrence through which the injury was sustained.

Reversed and remanded for reentry of the circuit court's order granting defendant partial summary disposition.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would have affirmed the Court of Appeals' judgment and remanded the case to the circuit court for further proceedings. Statutory notice requirements should be enforceable only to the extent that a defendant is prejudiced by a plaintiff's noncompliance. Preventing actual prejudice to a defendant because of lack of notice is the primary legitimate purpose of notice provisions. Justice KELLY would have held that partial summary disposition on the basis of failure to comply with the 60-day notice requirement was inappropriate because defendant had notice of the factual basis of plaintiff's tort claims when she filed a claim for no-fault benefits with defendant's insurance carrier and defendant, through its carrier, received plaintiff's medical records as well as other reports regarding her condition. Thus, plaintiff substantially complied with MCL 124.419 and defendant was not prejudiced.

GOVERNMENTAL IMMUNITY — COMMON CARRIER — NOTICE OF TORT CLAIMS — NO-FAULT CLAIMS.

Under MCL 124.419, claims brought against a transportation authority in derogation of governmental immunity must be presented as an ordinary claim against the common carrier involved; written notice of a claim involving injury to persons o property must be served on the authority within 60 days of the occurrence through which the injury occurred; ordinary claims include traditional tort claims arising out of occurrences involving a common carrier through which injury is sustained, but a claim for no-fault benefits is not an ordinary claim for purposes of MCL 124.419 because it is not a tort claim, and notice of a plaintiff's application for first-party no-fault benefits does not constitute written notice of a third-party tort claim sufficient to comply with the statute; there is no aspect of substantial compliance to the statutory notice requirement.

Reifman & Glass, P.C. (by *Steven W. Reifman* and *Allen I. Glass*), for Vivan Atkins.

Zausmer, Kaufman, August, Caldwell & Tayler, *P.C.* (by *Mark J. Zausmer* and *Carson J. Tucker*), for the Suburban Mobility Authority for Regional Transportation.

Amici Curiae:

Vandeveer Garzia, P.C. (by *Hal O. Carroll*), for Michigan Defense Trial Counsel, Inc.

Mellon Pries, P.C. (by *James T. Mellon* and *David Kowalski*), for the Michigan Municipal Risk Management Authority.

Heather A. Glazer for the Michigan Association for Justice.

YOUNG, C.J. Plaintiff was a passenger on a bus operated by the Suburban Mobility Authority for Regional Transportation (SMART) when the bus was involved in an accident. Plaintiff filed an application for

no-fault benefits with SMART's insurer soon thereafter, but waited more than seven months to notify SMART that she might pursue liability in tort. SMART moved for partial summary disposition, arguing that the notice provision of the Metropolitan Transportation Authorities Act, MCL 124.419, required notice of plaintiff's tort claims within 60 days of the accident as a condition precedent to maintaining those claims. The circuit court granted SMART partial summary disposition, but the Court of Appeals reversed.

MCL 124.419 requires that a plaintiff who wishes to bring a claim for injury to person or property arising out of an incident with a common carrier like SMART must provide notice of the claim to the transportation authority within 60 days. Statutory notice requirements must be interpreted and enforced as plainly written. Thus, we hold that notice of plaintiff's application for no-fault insurance benefits, even when supplemented with SMART's presumed "institutional knowledge" of the underlying facts of the injury, does not constitute written notice of a third-party tort claim against SMART sufficient to comply with MCL 124.419. The provisions of MCL 124.419 apply to "ordinary claims" that arise in connection with a common carrier, and the 60-day notice requirement pertains to such claims for personal injury or property damage. An ordinary claim against a common carrier does not include claims made for first-party no-fault benefits. Those no-fault claims are not ordinary tort claims, but a statutory benefit permitted in lieu of tort remedies. Thus, the statutory notice provision does not apply to no-fault claims, and an application for first-party no-fault benefits does not satisfy the statutory requirement to provide the transportation authority notice of a plaintiff's intent to pursue a third-party tort claim. Nor does a common carrier's presumed institutional knowledge of an injury or

occurrence relieve a claimant of the obligation to give the formal notice required by the statute.

The judgment of the Court of Appeals is reversed.

I. FACTS AND PROCEDURAL HISTORY

On September 15, 2006, plaintiff, Vivian Atkins, was a passenger on a SMART bus when it collided with another SMART bus. SMART immediately investigated the accident at the scene, but plaintiff did not believe that she had sustained any serious injuries and did not stay for the investigation. However, approximately 10 days after the accident, plaintiff contacted ASU Group, SMART's no-fault claims representative, and advised that she had been injured in the accident. ASU sent plaintiff an application for no-fault benefits, which she completed and returned to ASU. Plaintiff identified her medical providers and described injuries to her shoulders, stomach, and back.

SMART, through its insurer, began paying plaintiff first-party, no-fault benefits. While paying benefits, SMART received updates on plaintiff's condition, including a physician's report. SMART also became aware that plaintiff was on a short leave of absence from work beginning on October 30, 2006, and that plaintiff's mother and daughter were performing some household services for plaintiff. Unfortunately, plaintiff's condition continued to worsen, and an MRI revealed disk herniations and degenerative changes in her spine. Through her attorney, plaintiff sent a letter to SMART on May 4, 2007, notifying that entity of her intent to pursue tort claims arising out of the accident.

On August 7, 2007, plaintiff filed a complaint against SMART, alleging third-party claims for negligence resulting in a serious impairment of body function, negligent entrustment, and respondeat superior, as well as

a claim for first-party no-fault benefits. SMART moved for summary disposition with respect to the tort claims, alleging that plaintiff had failed to give notice of her tort claims as prescribed by MCL 124.419, which provides in relevant part:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained . . . .

The Wayne Circuit Court held that plaintiff had given notice of injury, but had failed to give notice of her tort claims within 60 days as required by the statute. The court thus granted summary disposition to SMART on the tort claims.

The Court of Appeals reversed, reasoning that SMART's knowledge of plaintiff's no-fault claim and the aggregate information that plaintiff had provided to SMART and its insurer were sufficient to give SMART written notice of a third-party tort claim.[1] The Court observed that MCL 124.419 does not "delineate between notice of a claim for first-party no-fault benefits and notice of a third-party tort claim."[2] The Court thus reasoned that this provision only requires notice of "a" claim, which it defined as the aggregate of operative facts giving rise to an enforceable right.[3] As a result, reasoned the Court of Appeals, the statute only requires notice without any additional specific requirements of

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[1] *Atkins v Suburban Mobility Auth for Regional Transp*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2009 (Docket No. 288461), p 3.

[2] *Id*. at 2.

[3] *Id*. at 2-3.

what information must be included.[4] On the basis of this analysis, the Court concluded that SMART had sufficient notice of plaintiff's tort claim within the 60-day period:

> Defendant . . . had timely notice that plaintiff was injured, and it knew that, 60 days after the accident, she continued to require medical treatment, provision of household services, and restriction from work. While plaintiff had no proof that she had suffered permanent disfigurement or serious impairment of body function, by the expiration of the 60-day period, defendant had notice of the operative facts needed to anticipate plaintiff's tort claim, and plaintiff had demanded payment for her injuries. The statute does not require a defendant to know what legal theory a plaintiff will pursue, only that it have notice of facts giving rise to a right to seek damages or payment. Therefore, we hold that the information defendant had before the expiration of the 60-day period was sufficient to provide written notice of plaintiff's third-party claim.[5]

Finally, the Court of Appeals qualified its conclusion, noting that not all no-fault claims would constitute notice of a tort claim:

> For example, if the plaintiff's injury was something that apparently would be quickly resolved (like an abrasion or bruise), or if the circumstances of the accident were such that there was no apparent negligence by the defendant (such as a hit-and-run driver running into the defendant's vehicle), a defendant would not necessarily have notice that a tort claim would follow. For this reason, defendant is correct in its argument that merely having notice of the accident is insufficient. But here, *defendant had notice of all the facts that would support plaintiff's third-party claim*.[6]

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[4] *Id.*

[5] *Id.* at 3.

[6] *Id.* (emphasis added).

SMART applied for leave to appeal in this Court. We ordered arguments on SMART's application, directing the parties to consider "whether written notice of the plaintiff's no-fault claim, together with SMART's knowledge of facts that could give rise to a tort claim by the plaintiff, constituted written notice of her tort claim sufficient to comply with MCL 124.419."[7]

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of summary disposition motions.[8] This case calls on us to consider the statutory notice provision of MCL 124.419. Matters of statutory interpretation are also reviewed de novo.[9]

III. ANALYSIS

Generally, governmental agencies in Michigan are statutorily immune from tort liability.[10] However, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed.[11] Statutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities. It is well established that statutory notice requirements must be interpreted and enforced as

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[7] *Atkins v SMART*, 489 Mich 958 (2011).

[8] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

[9] *Id*.

[10] See generally MCL 691.1401 *et seq*.; *Rowland*, 477 Mich at 202-203.

[11] See *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919 (1908) ("It being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose."); accord *Rowland*, 477 Mich at 212.

plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate.[12]

The Metropolitan Transportation Authorities Act describes in what manner liability may be imposed on a transportation authority for situations involving the operation of a common carrier for hire. It includes a notice provision, MCL 124.419, which provides in full:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: *Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained* and the disposition thereof shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority.[13]

MCL 124.419 thus provides that claims may be brought against a transportation authority in derogation of governmental immunity and requires that those claims be presented as "ordinary claims" against the common carrier involved. The statute then imposes certain statutory restrictions on the resultant suits against common carriers. First, when the claim involves injury to person or property, the statute requires written notice of the claim to be served within 60 days of the injury. The statute further provides that any judgment obtained is payable from funds of the authority and

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[12] See *Rowland*, 477 Mich at 211; see also *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012).

[13] Emphasis added.

restricts jurisdiction to courts in the counties where the authority carries on its function.

At issue in this case is whether an application for no-fault benefits can suffice as the notice of a separate tort claim that MCL 124.419 requires. Our primary objective when interpreting a statute is to discern the Legislature's intent. "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent . . . .' "[14] When the Legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted.[15]

The Court of Appeals held that plaintiff's no-fault application and her communications with SMART or its insurer provided SMART with sufficient knowledge to anticipate plaintiff's tort claim, and thus sufficed as the notice required to satisfy the statute. We disagree. MCL 124.419 plainly requires "written notice" of any "ordinary claims" for personal injury within 60 days of the underlying occurrence, and the ordinary claims that may be brought pursuant to the statute are qualitatively different from a demand for no-fault benefits paid by a common carrier's insurer. Accordingly, the demand for no-fault benefits and other communications with SMART or its insurer did not satisfy the "written notice" requirement with respect to plaintiff's ordinary claims.

The text of MCL 124.419 indicates that its provisions pertain only to ordinary claims brought against a transportation authority. In order to effectuate the Legislature's purpose, we interpret statutes cohesively, and we

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[14] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[15] *Sun Valley*, 460 Mich at 236.

read specific statutory provisions in the context of that which surrounds them.[16] The prefatory clause of MCL 124.419 states that "[a]ll claims that may arise in connection with the transportation authority shall be presented as ordinary claims." The statute then provides the specific limitation that "any claim based upon injury to persons or property" must be made within 60 days of the underlying occurrence. The reference to "any claim" is part of the same sentence as the prior language discussing "ordinary claims," and it most naturally reads as modifying "ordinary claims." Accordingly, the 60-day limitation of MCL 124.419 applies to "any" ordinary claims brought against the transportation authority that arise out of injury to persons or property.

While the term "ordinary claims" is undefined by statute, it may reasonably be understood to include traditional tort claims arising out of occurrences involving a common carrier through which such injury is sustained.[17] This understanding corresponds with the purpose of the statute: to set forth the requirements by which a person may recover against a common carrier for its liabilities, which includes tort liabilities involving injury to persons or property. We also discern from the statutory text that these ordinary claims are to be paid from funds of the authority.

Contrary to this framework, an application for no-fault benefits is not an ordinary claim as contemplated by MCL 124.419. A claim for no-fault benefits is not a tort claim, nor is it comparable to one. In fact, no-fault systems are generally designed to *supplant* tort recov-

[16] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008); *Sun Valley*, 460 Mich at 236-237.

[17] See, e.g., *Trent v Suburban Mobility Auth for Regional Transp*, 252 Mich App 247; 651 NW2d 171 (2002), discussed later in this opinion.

ery in most situations. Moreover, claims for no-fault benefits are not paid from funds of the authority, as traditional tort claims are, but are paid by a carrier's no-fault insurer. The legislatively chosen language thus indicates that ordinary tort claims like those pursued by plaintiff here and to which MCL 124.419 applies are distinct from claims for other kinds of benefits, such as those provided by the no-fault act.

Apart from the textual indications supporting this analysis, we recognize that claims for first-party no-fault benefits and third-party tort benefits are qualitatively distinct in nature, such that notice of one does not serve as notice of the other. Most notably, an application for first-party insurance benefits *recoverable without regard to fault* cannot be equated with a claim for *at-fault* tort liability. First-party benefits under the no-fault act are creations of, and thus only available pursuant to, statutory law. And SMART's insurer is *required* to pay no-fault personal protection insurance benefits to individuals injured in accidents involving their buses.[18] A person who proves his entitlement to first-party benefits has proved none of the elements that would entitle him to tort damages. A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover. Therefore, notice of a claim for first-party benefits is not the equivalent of notice of a third-party tort claim.[19]

The decision of the Court of Appeals in *Trent v Suburban Mobility Auth for Regional Transp* is instructive. In *Trent*, the Court of Appeals examined whether

[18] See MCL 500.3105(1).

[19] Not even the dissent here disagrees with this construction and conclusion.

a claimant seeking first-party no-fault benefits was required to meet the 60-day notice requirement of MCL 124.419. The Court held that MCL 124.419 does *not* apply to claims for no-fault benefits, but does apply to third-party claims for personal injury.[20] The Court reasoned that MCL 124.419 contemplates claims brought as "ordinary claims against a common carrier," whereas a no-fault claim is statutory and unrelated to SMART's status as a common carrier. Thus, the plaintiff in *Trent* did not have to provide notice of her no-fault claim within 60 days under MCL 124.419 to be entitled to no-fault benefits because the statute was inapplicable to that *type* of benefit sought.[21]

Trent appropriately held that the 60-day window to file notice of an ordinary claim in MCL 124.419 does not apply or limit a plaintiff's ability to bring a no-fault claim for benefits. While this case presents the converse factual situation in which plaintiff argues that notice of a no-fault claim *is* sufficient to apprise a defendant of the required statutory notice of a tort claim, the *legal principle* remains the same: no-fault claims and fault-based tort claims are qualitatively different. Thus, in *Trent*, a requirement that applies to ordinary tort claims did not apply to a claim for no-fault benefits, and

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[20] *Trent*, 252 Mich App at 251-252.

[21] While we cite *Trent* with approval in this regard, we specifically disavow the additional holding of *Trent* that a defendant must show actual prejudice in order to enforce a statutory notice provision. This Court has since held that when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed, and overruled the contrary cases on which *Trent* relied in this regard. See *Rowland*, 477 Mich at 201; see also *McCahan*, 492 Mich at 733, 746-747 (reaffirming the principle of *Rowland* and clarifying that it applies to other similar statutory notice provisions). Of course, this principle applies with equal force here.

here, a request for no-fault benefits does not apprise the defendant of the desire to pursue liability in tort.

The Court of Appeals erred to the extent that it held that plaintiff's no-fault claim and SMART's institutional knowledge essentially put SMART on notice of a likely at-fault claim. Ultimately, plaintiff's application for no-fault benefits in this case only asserted her right to, and demanded payment for, no-fault benefits. Plaintiff did not assert any right to recovery in tort or make a demand for tort damages within 60 days. The claim asserted in plaintiff's application for no-fault benefits was qualitatively different from a claim for recovery in tort and could not reasonably apprise SMART that plaintiff would pursue a tort action. Plaintiff's interpretation, and that of the Court of Appeals, essentially rewrites the statutory text to provide that notice of any one claim—however distinct—suffices as notice of any other claim that plaintiff may pursue even when the statute plainly requires "written notice of any claim."

Further, the Court of Appeals compounded this error by importing concepts of substantial compliance and SMART's institutional knowledge of the accident gleaned from other sources as sufficient to provide the notice required by MCL 124.419. The statute requires "written notice" of "claims," which must be "served" upon SMART. A "claim" is "a demand for something as due; an assertion of a right or an alleged right."[22] A claim is not merely an occurrence; it is a demand for payment pursuant to a legal right as a result of that occurrence.[23] The statute does not permit knowledge of facts that could give rise to a claim, as the Court of Appeals held, but rather it requires written notice of the claim itself. Knowledge of operative facts is not

[22] *Random House Webster's College Dictionary* (2000).

[23] Black's Law Dictionary (8th ed).

equivalent to written notice of a claim. Similarly, aggregate knowledge of an event such as an accident cannot be served on a defendant. Instead, the requirement that "written notice of any claim . . . shall be served *upon the authority*" indicates that a formal delivery of notice of the claim is intended by the statutory language.[24]

By providing that the accumulated information obtained by SMART from other sources, in addition to a no-fault application, substantially met the requirement that plaintiff provide written notice of her tort claims, the Court of Appeals replaced a simple and clear statutory test with a test based on apparent or imputed knowledge. The Court of Appeals' holding would require SMART and its counterparts to *anticipate* when a tort claim is likely to be filed on the basis of the underlying facts. In short, it would require a governmental agency to divine the intentions of an injured or potentially injured person and then notify itself that the person may file a suit in tort. This approach entirely subverts the notice process instituted by the Legislature. And the legislative purpose behind this process is clear: it requires specific statutory notice of any claim so that a common carrier defendant does not have to anticipate or guess whether a claim will be filed at some point in the future. Instead, the common carrier must simply be told of the claim within 60 days and through service of a notice. For these reasons, the decision of the Court of Appeals contravenes the clear language of MCL 124.419 and must be reversed.[25]

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[24] Emphasis added. See *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010).

[25] The dissent's argument here is precisely the same as the one made by the dissenting justice in *McCahan*, 492 Mich at 753-757, 759-761 (MARILYN KELLY, J., dissenting), which itself substantively repeats the arguments made by the dissent in *Rowland*, 477 Mich at 248 (MARILYN KELLY, J., concurring in part and dissenting in part). In short, the dissent

IV. CONCLUSION

Statutory notice requirements like the one at issue in this case must be interpreted and enforced as plainly written. The Legislature has determined that it will waive governmental immunity in cases of personal injury or property damage that occur in connection with a common carrier of passengers for hire only when written notice of the claim is served on the transportation authority within 60 days. Our opinion today enforces that legislative determination.

Because plaintiff did not comply with the notice requirement provided in MCL 124.419, that statute precludes her from maintaining her tort claims against SMART. Plaintiff's accident occurred on September 15, 2006. Plaintiff thus had 60 days, or until November 14, 2006, to serve notice of her tort claims on SMART. Plaintiff first raised her tort claims in a letter from her counsel sent to SMART on May 4, 2007. Thus, MCL 124.419 precludes her from maintaining those claims against SMART. Accordingly, we reverse the judgment of the Court of Appeals and remand this case for reentry

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primarily disagrees with this Court's decision to enforce the language of MCL 124.419 and, in particular, the *Legislature's* designated consequence for failure to comply with the statutory notice requirement. Oddly, although this case is one of statutory construction, the dissent undertakes no effort whatsoever to interpret the *actual words* of the statute that we are charged with interpreting. Instead, once again the dissent relies on a nonexistent, often repudiated "judicial prejudice requirement" to avoid the effect of the statutory language. Rather than repetitively restating yet again that which has already been authoritatively explored in decisions of this Court, for a full discussion of these issues we refer to, and incorporate by reference, this Court's prior opinions repudiating the various arguments raised by the dissent. See *McCahan*, 492 Mich at 747-751; *Rowland*, 477 Mich at 202-214. In accordance with these decisions, we continue to advance the simple constitutional notion that this Court lacks the authority to rewrite statutory language or otherwise avoid by judicial innovation the Legislature's dictates.

of the circuit court's order granting partial summary disposition in favor of SMART.

MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

MARILYN KELLY, J. (*dissenting*). The issue presented in this case—whether plaintiff's failure to strictly comply with MCL 124.419's notice requirement mandates dismissal of her claim—is hardly novel. The majority takes this opportunity to perpetuate its restriction to access to our courts by holding, yet again, that failure to comply with a notice requirement requires dismissal of a suit. As I have detailed on several occasions, I would hold that statutory notice requirements are enforceable only to the extent that a defendant is prejudiced by a plaintiff's failure to comply. Because defendant in this case was not prejudiced by plaintiff's failure to comply, I respectfully dissent.

ANALYSIS

The proper interpretation and application of statutory notice provisions like MCL 124.419[1] have long

[1] MCL 124.419 provides, in relevant part:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained . . . .

I agree with the majority's conclusion that this provision requires potential claimants to notify the defendant of "any claim." Considering the language of the statute, an application for no-fault benefits is not the same as written notice of an impending tort action. However, as discussed later, I believe that notice of a request for no-fault benefits arising out of the same underlying facts may be sufficient notice of an impending tort

occupied our courts. While early decisions of our Court strictly construed notice provisions and allowed dismissal for failure to comply,[2] the Court changed course in 1970 in *Grubaugh v City of St Johns*.[3] In *Grubaugh*, the Court dealt with a statutory provision that required a plaintiff to give a governmental defendant notice of a claim within 60 days of the incident underlying the lawsuit. The Court held that the provision violated the Due Process Clause of the state constitution.[4]

Two years later in *Reich v State Highway Department*, the Court extended *Grubaugh* and held that a statute that included a 60-day notice provision was unconstitutional on equal protection grounds.[5] We reasoned that the state and federal constitutions forbid treating those injured by governmental negligence differently from those injured by a private party's negligence.[6]

The next year, in *Carver v McKernan*,[7] the Court considered the application of a six-month notice provision in the Motor Vehicle Accident Claims Act.[8] The Court somewhat retreated from *Grubaugh*'s and *Reich*'s holdings that statutory notice provisions are per se unconstitutional. *Carver* held that the notice provision in that case was constitutional, and thus enforceable,

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claim. I believe that a defendant would suffer no prejudice by the failure to file notice of the tort claim in these circumstances.

[2] See, e.g., *Davidson v City of Muskegon*, 111 Mich 454; 69 NW 670 (1897).

[3] *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970).

[4] *Id*. at 176.

[5] *Reich v State Hwy Dep't*, 386 Mich 617, 623-624; 194 NW2d 700 (1972).

[6] *Id*.

[7] *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973).

[8] MCL 257.1118.

but only if the plaintiff's failure to give notice prejudiced the party not receiving the notice.[9] The Court opined that while some notice provisions may be constitutionally permitted, others may not be, depending on the purpose served by the notice requirement.[10] The Court explained that if the notice provision served some purpose other than to prevent prejudice, it could be considered an unconstitutional legislative requirement.[11]

Three years later in *Hobbs v Department of State Highways*,[12] the Court reaffirmed the reasoning of *Carver*. Considering a 120-day notice requirement in the governmental tort liability act,[13] the Court held:

> The rationale of *Carver* is equally applicable to cases brought under the governmental liability act. Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in [MCL 691.1404] is not a bar to claims filed [under the act].[14]

Thus, *Hobbs* continued to employ a prejudice standard when construing statutory notice provisions.

Twenty years later in *Brown v Manistee County Road Commission*,[15] the Court reconsidered the propriety of *Hobbs*. We concluded that the statute at issue in that case was unconstitutional, reasoning that we were "unable to perceive a rational basis for the county road

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[9] *Carver*, 390 Mich at 100.

[10] *Id*.

[11] *Id*.

[12] *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976).

[13] MCL 691.1401 *et seq*.

[14] *Hobbs*, 398 Mich at 96.

[15] *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996).

commission statute to mandate notice of a claim within sixty days."[16] We further reasoned that there was no legitimate reason to subject some claimants to a 60-day notice period and others to a 120-day notice period.

Nonetheless, in 2007, four justices of the Court issued *Rowland v Washtenaw County Road Commission* and upended *Hobbs*, *Brown*, and their progeny as wrongly decided.[17] Those justices concluded that *Hobbs* and *Brown* had erroneously read actual prejudice requirements into statutory notice provisions and, in doing so, usurped the Legislature's power to mandate timely notice to defendants. I dissented from the Court's decision to overrule *Hobbs* and *Brown*. I opined that the Court did not need to reach the validity of those cases in deciding *Rowland* but that, in any event, they had been properly decided. I stated:

> Even if it were proper to reach the 120-day notice requirement in this case, it would not be appropriate to overturn *Hobbs* and *Brown*. Together, these cases represent 30 years of precedent on the proper meaning and application of MCL 691.1404. Such a considerable history cannot be lightly ignored. And the Legislature's failure to amend the statute during this time strongly indicates that *Hobbs* and *Brown* properly effectuated its intent when enacting MCL 691.1404(1).
>
> The primary goal of statutory interpretation is to give effect to legislative intent. In both *Hobbs* and *Brown*, the Court identified the intent behind the notice provision as being to prevent prejudice to a governmental agency. [In *Hobbs*, the Court held that] [a]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision . . . . For 20 years, the Legislature knew of this interpretation but took

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[16] *Id*. at 363.

[17] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 210-213; 731 NW2d 41 (2007).

> no action to amend the statute or to state some other purpose behind MCL 691.1404(1). The Court then readdressed the statute in *Brown* and came to the same conclusion regarding the purpose behind MCL 691.1404(1).
>
> Another ten years have passed, but still the Legislature has taken no action to alter the Court's interpretation of the intent behind the statute. This lack of legislative correction points tellingly to the conclusion that this Court properly determined and effectuated the intent behind MCL 691.1404(1). If the proper intent is effectuated, the primary goal of statutory interpretation is achieved.[18]

I continue to stand by my dissenting opinion in *Rowland* and believe that in toppling decades of settled caselaw, the Court acted improperly. I would hold, consistently with *Hobbs* and *Brown*, that preventing actual prejudice to a defendant because of lack of notice is the primary legitimate purpose of notice provisions.[19] Consequently, a suit may be dismissed for lack of notice only when a defendant has been prejudiced.

In this case, plaintiff failed to provide the notice of intent to bring a tort claim within the 60-day period required by MCL 124.419. Applying the reasoning of *Hobbs*, *Brown*, and my partial dissent in *Rowland*, I would hold that defendant was not prejudiced by this failure. This is apparent for several reasons.

First, following the bus collision underlying plaintiff's claim, defendant immediately investigated the accident on its own accord. It did not believe that plaintiff had sustained any serious injuries, but was

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[18] *Id*. at 258-259 (MARILYN KELLY, J., concurring in part and dissenting in part) (quotation marks and citations omitted).

[19] Rather than repeat my response to the majority's criticism of my position, I refer the reader to my dissenting opinions in *McCahan v Brennan*, 492 Mich 730, 752-762; 822 NW2d 747 (2012) (MARILYN KELLY, J., dissenting), and *Rowland*, 477 Mich at 248 (MARILYN KELLY, J., concurring in part and dissenting in part).

nonetheless aware of the incident and of plaintiff's involvement. Defendant also obtained a statement from one of the bus drivers, a supervisor's accident investigation report, and a transit accident report, all within several days of the accident. Thus, defendant was cogently aware of the basis for plaintiff's claim and was not prejudiced by plaintiff's failure to file a notice of intent to sue.

Second, within 10 days of the accident, plaintiff advised defendant's insurer, ASU Group, that she had been injured in the collision. ASU Group provided her with an application for no-fault benefits, which she completed and returned. In her application, plaintiff explicitly noted her injuries that resulted from the accident as well as her health insurance information. She noted that her doctors had prescribed medication for her. She also provided a list of the physicians treating her and their contact information.

ASU Group contacted each of plaintiff's physicians and obtained her medical records related to the accident. ASU Group's notes on plaintiff's case indicate that it was aware that during plaintiff's convalescence, her mother and daughter performed household services for her. Its notes further reflect that with plaintiff's anticipated wage loss, treatment, and household services, she would not be able to cover her expected medical costs. Finally, defendant was aware that plaintiff's condition continued to worsen several weeks after the accident and that magnetic resonance imaging depicted disk herniations and degenerative changes in her spine. Thus, defendant was acutely aware of plaintiff's injuries and the factual basis for her tort claims.

This information that plaintiff provided to defendant and its insurer put defendant on notice of plaintiff's tort claims against it. This is not a case of a failure to

substantially comply with a notice requirement. Indeed, plaintiff substantially complied with MCL 124.419 and, as the record indicates, defendant was well aware of the genesis of plaintiff's claims. Defendant was also fully apprised of all details relevant to plaintiff's suit by virtue of its insurer's active communication with plaintiff within the 60-day notice period. Accordingly, defendant suffered no prejudice when plaintiff did not give notice of her intent to pursue tort claims until several months after expiration of the 60-day notice period. I reject the notion that slavish adherence to form must be shown in this case when the legislative purpose of the notice requirement was so clearly fulfilled.

CONCLUSION

I would affirm the judgment of the Court of Appeals. I would hold that plaintiff's failure to provide notice within 60 days of the incident does not mandate partial summary disposition in favor of defendant. Rather, because defendant was not prejudiced by plaintiff's failure to file notice, this Court should remand her case to the trial court for further proceedings. Accordingly, I respectfully dissent.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

McCAHAN v BRENNAN

Docket No. 142765. Argued March 6, 2012. Decided August 20, 2012.

Christina McCahan was injured in an automobile accident on the campus of the University of Michigan on December 12, 2007. The other driver, Samuel K. Brennan, was driving a car owned by the university and was on university business at the time. On May 7, 2008, McCahan's counsel sent a letter to the university indicating that counsel intended to represent McCahan in a lawsuit concerning the accident. On October 31, 2008, McCahan filed in the Court of Claims a notice of intent to file a claim. After McCahan brought the action against Brennan and the University of Michigan Regents in the Court of Claims, the university sought summary disposition on the basis that the notice of intent had not been filed within the six-month period provided in MCL 600.6431(3). The court, Archie C. Brown, J., agreed with the university and granted summary disposition in its favor. McCahan appealed. The Court of Appeals, SAWYER, P.J., and SAAD, J. (FITZGERALD, J., dissenting), affirmed. 291 Mich App 430 (2011). McCahan sought leave to appeal. The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 489 Mich 985 (2011).

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Statutory notice requirements must be interpreted and enforced as plainly written, and courts may not engraft a requirement of actual prejudice onto a statutory notice requirement as a condition to enforcement of the statute or otherwise reduce the obligation to comply fully with statutory notice requirements.

1. MCL 600.6431(1) prohibits claims against the state unless the claimant files with the Clerk of the Court of Claims within one year after the claim accrued either a specific statutory notice of intent to file a claim or the claim itself. MCL 600.6431(3), however, requires any person who wishes to bring an action against a state entity for personal injury or property damage to file with the Clerk of the Court of Claims either the specific statutory notice of intent to pursue a claim or the claim itself within six months of the incident giving rise to the cause of action. Statutes must be read

reasonably and in context. MCL 600.6431(1) sets forth the general notice required for a party to bring a lawsuit against the state, while MCL 600.6431(3) sets forth a special timing requirement applicable to a subset of those cases. The general requirements of MCL 600.6431(1) apply to MCL 600.6431(3) except when modified by the specific provisions of MCL 600.6431(3). Accordingly, the prohibition on maintaining a claim against the state contained in MCL 600.6431(1) if the notice requirements are not met applies to the subset of cases described in MCL 600.6431(3) involving personal injury or property damage.

2. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), held that, it being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms. When the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed. This holding was not limited to cases involving the highway exception to governmental immunity, which was at issue in that case. Rather, it applies to similar statutory notice or filing provisions, including the one that was at issue in this case. McCahan's failure to timely file the required notice in the Court of Claims barred her action regardless of whether the university otherwise received information regarding plaintiff's apparent intent to pursue a claim.

Affirmed.

Justice MARILYN KELLY, joined by Justice CAVANAGH and by Justice HATHAWAY (except for the part entitled "Response to the Majority"), dissenting, would have reversed the judgment of the Court of Appeals, set aside the grant of summary disposition, and remanded the case to the trial court for further proceedings. In *Rowland*, the Court acted improperly by toppling decades of settled caselaw, holding that those cases had improperly read a requirement of actual prejudice into statutory notice provisions. Preventing actual prejudice to a defendant as the result of a lack of notice is the primary legitimate purpose of statutory notice provisions. Consequently, a suit should be dismissed for late notice only when a defendant was prejudiced by a plaintiff's noncompliance with a statutory notice provision. In this case, the university was not prejudiced because McCahan substantially complied with the requirement and the university was actually aware within six months of the accident that McCahan had retained counsel to pursue a lawsuit against it.

ACTIONS — COURT OF CLAIMS — PERSONAL INJURY OR PROPERTY DAMAGE — NOTICE OF INTENT TO FILE A CLAIM AGAINST THE STATE — FAILURE TO COMPLY — ACTUAL PREJUDICE.

MCL 600.6431(3) requires any person who wishes to bring an action against a state entity for personal injury or property damage to file with the Clerk of the Court of Claims either a specific statutory notice of intent to pursue a claim or the claim itself within six months of the incident giving rise to the cause of action or the claim is barred under MCL 600.6431(1); the state entity need not show that it was actually prejudiced by the plaintiff's failure to comply with the statutory notice requirement.

Allan Falk, P.C. (by *Allan Falk*), and *Moss & Colella, P.C.* (by *Christian P. Collis*), for Christina McCahan.

Karl V. Fink, Special Assistant Attorney General, for the University of Michigan Regents.

Amicus Curiae:

Speaker Law Firm, PLLC (by *Steven A. Hicks*), for the Michigan Association for Justice.

YOUNG, C.J. In *Rowland v Washtenaw County Road Commission*,[1] this Court held that, it being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms. We take this opportunity to reaffirm and apply this fundamental principle articulated in *Rowland* to the interpretation of MCL 600.6431, the notice provision of the Court of Claims Act at issue in this case.

The Court of Appeals correctly determined that when the Legislature conditions the ability to pursue a claim against the state on a plaintiff's having filed specific statutory notice, the courts may not engraft an "actual prejudice" component onto the statute as a precondi-

[1] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

tion to enforcing the legislative prohibition. We reiterate the core holding of *Rowland* that such statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate. We further clarify that *Rowland* applies to all such statutory notice or filing provisions, including the one at issue in this case.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Christina McCahan, was injured in an automobile accident on December 12, 2007. The collision involved a student who was driving a car owned by the University of Michigan. Plaintiff sought to recover damages from the university for her injuries. MCL 600.6431 requires any person who wishes to bring an action against state entities for personal injury or property damage to file with the Clerk of the Court of Claims either a specific statutory notice of intent to pursue a claim or the claim itself within six months of the incident giving rise to the cause of action. MCL 600.6431 provides:

> (1) *No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim* against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> * * *
>
> (3) *In all actions for property damage or personal injuries, claimant shall file* with the clerk of the court of

> claims a notice of intention to file a claim or the claim itself *within 6 months* following the happening of the event giving rise to the cause of action.[2]

Plaintiff did not file a verified notice of intent to file a claim with the Clerk of the Court of Claims within six months after the accident. However, plaintiff and her counsel undertook numerous efforts to inform the university's legal office of her intent to seek recovery against the university. These actions included plaintiff's counsel's sending a letter to the university's legal office, plaintiff and her counsel meeting with and providing all then available documentation relating to the accident to the university's senior claims representative by the six-month deadline of June 12, 2008, and plaintiff's continuing to provide further information to the representative thereafter. On October 31, 2008, more than 10 months after the accident, plaintiff filed with the Clerk of the Court of Claims a notice of intent to bring suit against the university. Plaintiff filed her action against the university in the Court of Claims on December 5, 2008.

The university subsequently moved for summary disposition, contending that plaintiff's failure to file notice of intent to file a claim or the claim itself within the six-month deadline required dismissal of her claim. The Court of Claims agreed, ruling that the six-month deadline of MCL 600.6431(3) is a modification of the requirements provided in MCL 600.6431(1) and thus the prohibition against maintaining a claim from subsection (1) applied because plaintiff had not filed her claim or notice of her intent to file a claim within six months. The court further ruled that plaintiff's arguments that she had substantially complied with the statute and that defendant suffered no prejudice as a result of any defects in notice failed in light of the specific language of the statute

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[2] MCL 600.6431 (emphasis added).

requiring the filing within six months after the accident in order to maintain the claim.

On appeal, the Court of Appeals affirmed in a split decision.[3] The Court of Appeals majority held that the filing of notice with the Court of Claims is a mandatory statutory requirement. Then, relying on the principles articulated in *Rowland*, the majority rejected plaintiff's argument that substantial compliance or the absence of prejudice to defendant could save plaintiff's claim.[4] The Court of Appeals dissent would have held that the university's actual knowledge of plaintiff's intent to file a claim sufficed to satisfy the statutory notice requirement of MCL 600.6431.[5]

We ordered argument on plaintiff's application for leave to appeal[6] and now affirm.

II. STANDARD OF REVIEW

This Court reviews de novo a lower court's decision to grant summary disposition to a party.[7] Further,

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[3] *McCahan v Brennan*, 291 Mich App 430; 804 NW2d 906 (2011).

[4] *Id.* at 434-436. The Court specifically noted that "the Michigan Supreme Court overturned several cases that had required the state to show actual prejudice when a plaintiff failed to comply with a statutory filing requirement." *Id.* at 434.

[5] *Id.* at 438 (FITZGERALD, J., dissenting). The dissent would have held that *Rowland* did not reach the facts of this case because it did not construe the particular statute at issue here, MCL 600.6431. Instead, the dissent would have applied the holding of *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985), which requires a showing of actual prejudice before enforcing a mandate that a claim may not be maintained for failure of statutorily required notice. See *McCahan*, 291 Mich App at 437-438 (FITZGERALD, J., dissenting), quoting and adopting the reasoning of Chief Judge MURPHY's dissenting opinion in *Prop & Cas Ins Co of the Hartford v Dep't of Transp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 285749) (MURPHY, C.J., dissenting).

[6] *McCahan v Brennan*, 489 Mich 985 (2011).

[7] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

whether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation, which we likewise review de novo.[8] Our primary objective when interpreting a statute is to discern the Legislature's intent. "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent . . . .' "[9] When the Legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted.[10]

III. ANALYSIS

Generally, governmental agencies in Michigan are statutorily immune from tort liability.[11] However, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed.[12] One such condition on the right to sue the state is the notice provision of the Court of Claims Act, MCL 600.6431, which provides in full:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim

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[8] *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005).

[9] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[10] *Sun Valley*, 460 Mich at 236.

[11] See, generally, MCL 691.1401 *et seq*.; *Rowland*, 477 Mich at 202-203.

[12] See *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919 (1908) ("It being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose."); accord *Rowland*, 477 Mich at 212.

> against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

Thus, MCL 600.6431 sets forth several requirements that must be met in order to bring suit against a governmental entity in derogation of governmental immunity. Pursuant to subsection (1), "[n]o claim may be maintained against the state" unless the claimant files "in the office of the clerk of the court of claims" either a written claim or a written notice of intent to file a claim within one year. The claim or notice must contain certain information, including the time and place that the claim arose, the nature of the claim, and the damages alleged and must be "signed and verified by the claimant before an officer authorized to administer oaths." Pursuant to subsection (2), "[s]uch claim or notice shall designate any . . . agency of the state involved in connection with such claim . . . ." And "a copy of such claim" shall be provided upon filing for the clerk to transmit to the Attorney General and the appropriate governmental agency. Finally, pursuant to

subsection (3), if the claim against the state is one for "property damage or personal injuries," the claimant must file with "the clerk of the court of claims" a notice or claim "within 6 months" of the incident—not one year, as is otherwise applicable to claims pursuant to subsection (1).

Plaintiff's appeal before this Court essentially raises two questions. First, what is the relationship between subsection (3), to which plaintiff's personal injury claim applies, and subsection (1)? In particular, does the bar-to-claims language of subsection (1) ("[n]o claim may be maintained against the state unless") apply to personal injury claims covered by subsection (3)? Second, what effect must be given to a failure to file either a claim or notice of intent to file a claim pursuant to subsection (3), particularly when a state entity otherwise received actual notice of plaintiff's injury?

We believe that a contextual understanding of MCL 600.6431 readily resolves the first question and that this Court's decision in *Rowland* has already decided the second. We hold that subsection (3) must be read in light of subsection (1), including that provision's prohibition on maintaining a suit as a consequence of a failure to file compliant notice within six months. In accordance with *Rowland*, we reaffirm that when the Legislature conditions the ability to pursue a claim against the state on a plaintiff's having provided specific statutory notice, the courts may not engraft an "actual prejudice" component onto the statute before enforcing the legislative prohibition.

A. MCL 600.6431 AS A CONTEXTUAL WHOLE

As a threshold matter, plaintiff argues that her claim, being a claim for personal injury, is not subject to the dictates or bar-to-claims language of MCL 600.6431(1).

Instead, plaintiff argues that only subsection (3) governs her claim and acts as an independent provision that excludes application of subsection (1). Accordingly, plaintiff argues that the failure of the Legislature to state that "[n]o claim may be maintained against the state" in subsection (3) as it has done in subsection (1) indicates that any failure to meet the notice requirements of subsection (3) does not subject a party to the prohibition on maintaining a claim against the state contained in subsection (1). As the lower courts did, we reject plaintiff's argument that subsection (3) must be read in isolation, segregated from the language, requirements, and context provided in subsection (1).

When undertaking statutory interpretation, the provisions of a statute should be read reasonably and in context.[13] Doing so here leads to the conclusion that MCL 600.6431 is a cohesive statutory provision in which all three subsections are connected and must be read together. Subsection (1) sets forth the general notice required for a party to bring a lawsuit against the state, while subsection (3) sets forth a special timing requirement applicable to a particular subset of those cases—those involving property damage or personal injury. Subsection (3) merely reduces the otherwise applicable one-year deadline to six months. In this regard, subsection (3) is best understood as a subset of the general rules articulated in subsection (1), and those general rules and requirements articulated in subsection (1)—including the bar-to-claims language—continue to apply to *all* claims brought against the state unless modified by the later-stated specific rules.

Our decision in *Robinson v City of Lansing*[14] is instructive in this regard. In *Robinson*, we interpreted

[13] See *Sun Valley*, 460 Mich at 236-237.

[14] *Robinson v City of Lansing*, 486 Mich 1; 782 NW2d 171 (2010).

the so-called "two-inch rule" of the highway exception to governmental liability, MCL 691.1402a, which sets forth a general rule in subsection (1) applicable to "county highways," followed by additional rules and exceptions in further subsections that speak only generically of "the highway." The issue before the Court was whether the rules in the additional subsections were limited like subsection (1) to "county highways" or whether they also applied to "state highways" like the one on which the plaintiff was injured. We unanimously held that there were sufficient textual indicia to determine that the references to highways in each of the subsections referred to county highways, even though subsection (1) was the only subsection explicitly referring to "county highways." In support of this conclusion, we held that there were no indications in the latter subsections that the scope of those subsections was different from subsection (1).[15] Further, we stated that "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole."[16] Thus, the fact that the Legislature did not expressly use the word "county" in the latter provisions did not mean that the prior use did not carry through to latter subsections. Finally, we noted that "the Legislature is not required to be overly repetitive in its choice of language. . . . Instead, we believe that a reasonable person reading this statute would understand that all three subsections of this provision apply only to *county* highways" even though the Legislature did not "repetitively restate 'county' throughout the entire statutory provision."[17]

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[15] *Id.* at 14.

[16] *Id.* at 15.

[17] *Id.* at 16.

Like *Robinson*, this case requires that we determine the extent to which language from one subsection of a statute applies to another subsection of the same statute. And as in *Robinson*, we believe that a reasonable person reading the statute would understand that subsections (1) and (3) are related and interdependent. Most important, the *context* of the entire statutory provision indicates that the six-month filing requirement for personal injury or property damage cases is a *modification* of the generally applicable one-year filing requirement. There is no indication from the language used that the provisions of subsection (1) do not apply to subsection (3), and the Legislature need not be overly repetitive in reasserting the requirements for notice in each subsection when the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases.

Further support for this conclusion is derived from the text of the statute itself. Subsection (3) begins with the prefatory phrase "[i]n all actions for property damage or personal injuries." Yet, the Court of Claims only has jurisdiction over claims brought against the state.[18] Thus, with this language the Legislature was obviously not referring to "*all* actions for property damage or personal injuries," but only to those actions "against the state," as limited in subsection (1). If subsection (3) were to be read in isolation, without reference to what the Legislature had already set forth in subsection (1), it would be impossible to reasonably interpret subsection (3)'s prefatory clause.

Moreover, the various subsections of MCL 600.6431 refer to each other. For example, subsection (3) employs the phrase "notice of intention to file a claim," which is

[18] See MCL 600.6419 (providing for exclusive original jurisdiction for claims made against the state).

the same phrase that is used and defined in detail in subsection (1). Similarly, subsection (2) directly refers to subsection (1) by noting that "[s]uch claim or notice" as described in subsection (1) must designate the responsible governmental agency; this language clearly indicates that subsection (2) is an elaboration of the requirements stated in subsection (1). Reading this statute as a whole, it is reasonably clear that these subsections are not independent entities that happen to be grouped together in the same statutory provision. Instead, they are related and interdependent, and thus cannot be read in isolation.

Thus, in accordance with prior interpretations of MCL 600.6431, we conclude that the statutory provision must be understood as a cohesive whole.[19] Subsection (1) sets forth the general rule, for which subsection (2) sets forth additional requirements and which subsection (3) modifies for particular classes of cases that would otherwise fall under the provisions of subsection (1). Accordingly, *subsection (3) incorporates the consequence for noncompliance with its provisions expressly stated in subsection (1) and does not otherwise displace the specific requirements of subsection (1) other than the timing requirement for personal injury or property damage cases*. Therefore, the failure to file a compliant claim or notice of intent to file a claim against the state within the relevant time periods designated in either subsection (1) or (3) will trigger the statute's prohibition that "[n]o claim may be maintained against the state . . . ."

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[19] Notably, plaintiff offers no authority for her interpretation of MCL 600.6431 and, in fact, every case presented by the parties—including those on which plaintiff relies—has interpreted subsection (3) to contain a bar to nonconforming claims. See, e.g., *May*, 140 Mich App at 731-732 (holding that a plaintiff's claim may be barred by failure to comply with subsection (3) if the defendant shows prejudice). And the dissent in this case also rejects plaintiff's interpretation.

B. APPLICATION OF *ROWLAND*

Having concluded that the bar-to-claims language of MCL 600.6431(1) applies to this case because plaintiff failed to file a claim or notice of intent to file a claim with the Clerk of the Court of Claims within six months, we must also address whether dismissal is required. Plaintiff argues that the university was not prejudiced by her failure to file notice of intent to file her claim in the Court of Claims within six months because she otherwise timely provided the university's legal office with notice of the accident, information sufficient to investigate the accident, and notice of her intent to bring suit if necessary to resolve her claim. We disagree. The lower courts correctly held that plaintiff's failure to file the required notice in the Court of Claims bars her action regardless of whether the university was otherwise put on notice of plaintiff's apparent intent to pursue a claim. The reasoning of *Rowland* is directly on point and thus controls this matter.

In *Rowland*, we interpreted the highway exception to governmental immunity, and in particular, its statutory requirement that "[a]s a condition to any recovery for injuries," an injured person must provide notice within 120 days from the time the injury occurred.[20] The plaintiff in *Rowland* served notice on the defendant after 140 days, thus failing to meet the 120-day deadline. Examining whether this failure precluded the plaintiff from maintaining her claim, this Court rejected earlier caselaw that had assumed that notice provisions are constitutional only if they contain a prejudice requirement.[21] Instead, *Rowland* held that

[20] See MCL 691.1404(1).

[21] *Rowland*, 477 Mich at 201. The Court expressly overruled *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), and

when the plain language of a statute requires particular notice as a condition for recovery, "no 'saving construction' [is] necessary or allowed. Thus, the engrafting of [a] prejudice requirement onto the statute [is] entirely indefensible."[22]

Rowland noted that notice provisions are enacted by the Legislature in order to provide the state with the opportunity to investigate and evaluate claims, to reduce the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed.[23] Provisions requiring notice to a particular entity, like the Court of Claims in this case, further ensure that notice will be provided to the *proper* governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified.[24]

As in *Rowland*, the statutory language at issue here is clear. MCL 600.6431(1) details the notice requirements that must be met in order to pursue a claim

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implicitly overruled *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972), and *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970).

[22] *Rowland*, 477 Mich at 211.

[23] *Id.* at 210-212.

[24] Notably, the university's legal office is not a proper party to receive service of process on behalf of the University of Michigan under MCR 2.105(G)(7), let alone to receive notice of a claim governed by MCL 600.6431.

By naming the Clerk of the Court of Claims as the agent for the receipt of verified notice of potential claims, the Legislature has established a clear procedure that eliminates any ambiguity about whether an attempted notice is effective. A claimant who complies with MCL 600.6431 need not worry about whether a notice was properly received and processed by the correct governmental entity. By the same token, state entities can be secure knowing that only timely, verified claims in notices filed with the Court of Claims can give rise to potential liability, that the proper entity as well as the Attorney General will be notified, and that only such claims need to be investigated in anticipation of potential litigation.

against the state, including a general deadline of one year after accrual of the claim. MCL 600.6431(3) then modifies only the deadline requirement for a specific class of claims—those involving personal injury or property damage—replacing the one-year deadline with a six-month deadline. Thus, subsections (1) and (3) together provide that in all actions for personal injuries, "[n]o claim may be maintained against the state" unless the claimant files with the Clerk of the Court of Claims the required notice of intent to file a claim or the claim itself within six months. Indeed, this notice provision is substantively identical to the provision in *Rowland*.[25] Because plaintiff here failed to file *any* notice of an intent to pursue a claim against the university with the Court of Claims within six months, plaintiff's claim is barred by the plain language of the statute.

There has been some dispute in the Court of Appeals as to whether the holding of *Rowland* is limited to cases involving the highway exception to governmental immunity, MCL 691.1404(1), which *Rowland* interpreted.[26] This dispute unfortunately might have been created by concurrences filed in several orders of this Court that called into question whether *Rowland* was for some reason limited to the specific statute interpreted in that case.[27]

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[25] See MCL 691.1404(1) ("As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect.").

[26] In addition to the instant case, see, e.g., *Kline v Dep't of Transp*, 291 Mich App 651; 809 NW2d 392 (2011); *Prop & Cas Ins Co of the Hartford v Dep't of Transp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 285749).

[27] See *Beasely v Michigan*, 483 Mich 1025 (2009) (MARILYN KELLY, C.J., concurring); *Ward v Mich State Univ*, 485 Mich 917 (2009) (MARILYN

We can discern no principled reason to limit artificially the principles or logical import of *Rowland* to the circumstances of that case. Indeed, such a conclusion would be peculiar in all of our jurisprudence—a system of jurisprudence premised on the development of precedents to be followed in similar future cases, thereby ensuring that like cases are treated alike. There is nothing unique about the notice language of the highway exception to governmental immunity that would limit the principle stated in *Rowland* to the specific facts of that case or the interpretation of that statute. Further, there can be no dispute that the notice provision interpreted in *Rowland* and the notice provision at issue here, both of which contain bar-to-claims language, are similarly situated. Instead, the principle of *Rowland* is clear: when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed.

Accordingly, we clarify that *Rowland* applies to similar statutory notice or filing provisions, such as the one at issue in this case. To the extent that caselaw from the Court of Appeals or statements by individual members of this Court imply or provide otherwise, we disavow them as inconsistent with both the statutes that they sought to interpret and the controlling law of this state as articulated in *Rowland*.[28] Courts may not engraft an

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KELLY, C.J., concurring); see also *Chambers v Wayne Co Airport Auth*, 482 Mich 1136 (2008) (CAVANAGH, J., dissenting).

[28] We specifically note *May*, 140 Mich App 730, upon which the Court of Appeals dissent and plaintiff primarily rely. *May*, 140 Mich App at 731-732, grounded its holding that MCL 600.6431 was only constitutional if the governmental agency involved was required to show actual prejudice in large part on *Carver*, 390 Mich 96, and a Court of Appeals decision

actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements. Filing notice outside the statutorily required notice period does not constitute compliance with the statute.

IV. A BRIEF RESPONSE TO THE DISSENT

Contrary to the impression a reader might be left with upon reading the dissent, this case is not a basis to relitigate *Rowland*. The opinion in *Rowland*—thorough in its analysis and sound in its logic—speaks for itself, and we need not provide a point-by-point rebuttal to the dissent here where *Rowland* provided a detailed rebuttal to the same dissenting justice who raised the same unpersuasive arguments there. Although the dissent is entitled to disagree with a precedent of this Court, *Rowland* is the binding and applicable law, and we faithfully apply it today.

Accordingly, the dissent's conclusion that plaintiff "sufficiently" complied with the notice requirement of MCL 600.6431 is simply incorrect.[29] And the dissent's

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that also relied on *Carver*, *Hanger v State Hwy Dep't*, 64 Mich App 572; 236 NW2d 148 (1975). As noted earlier, *Rowland* implicitly overruled *Carver*, as well as expressly overruled the progeny of *Carver*, including *Hobbs* and *Brown*, all of which formed the basis for the pre-*Rowland* prejudice rule.

Given that this Court has overruled the decisions on which *May* was based, it should be reasonably clear that *May*, too, no longer remains good law for those propositions that have been overruled in the cases on which *May* relied.

[29] The dissent itself *concedes that plaintiff failed to provide the required statutory notice*. However, the dissent has simply decided against applying the *Legislature's* designated consequence for such a failure.

Curiously, the dissent characterizes this opinion as requiring that "MCL 600.6431 must be strictly enforced" and thus plaintiff's failure to provide notice to defendant "that complied in every detail with the statute requires that her entire claim be dismissed." *Post* at 752. We are

reasoning that dismissal is not warranted in this case because, in the dissent's view, defendant suffered no prejudice is legally irrelevant because the Legislature has not included a prejudice component in this statute.

Also noteworthy here is that which the dissent does *not* dispute. First, the dissent agrees with our reasoning that MCL 600.6431 must be read as a contiguous whole, as well as the resultant conclusion that subsection (3) includes the bar-to-claims language of subsection (1). Indeed, only disagreeing with our ultimate conclusion, the dissent leaves untouched the entirety of this opinion's textual analysis.[30] Second, other than its personal disagreement with the decision of *Rowland* itself, the dissent does not disagree that *Rowland* applies to the interpretation of MCL 600.6431. Further, the dissent proffers no reason why the principle of *Rowland*—which is a binding precedent, like any other decision of this Court—is not entitled to deference and application in similar notice cases pursuant to stare decisis, and the dissent does not contradict our conclusion that *Row-*

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at a loss why such a charge makes sense when we are merely giving the plain meaning to the words used by the Legislature. What we do here is not "strict enforcement" of the notice provision, but what any Court must do: give a *reasonable interpretation* to the language that the Legislature has passed and the Governor has signed into law. We find nothing "strict," as opposed to being merely reasonable, in concluding that "six months" means "six months," "files in the office of the clerk" means "files in the office of the clerk," and "in detail" means "in detail." Our view is that the rule of law requires that courts of this state must respect the legislative policy choices as expressed in the language of the statutes that come before them.

[30] Strangely enough, even though this case is one of statutory construction, the dissent undertakes no effort whatsoever to interpret the *actual words* of the statute that we are charged with interpreting, instead relying on a nonexistent prejudice requirement in support of its conclusion. The dissent's argument that this conclusion satisfies the intent of the Legislature is, of course, belied by the actual words chosen by the Legislature.

land is not limited to the statute interpreted in that case. For all these reasons, the dissent is entirely unresponsive to the arguments raised in this opinion that compel our conclusions.

A final note on an argument raised by the dissent. The dissent once again relies on the "highly disfavored" theory of legislative acquiescence in support of its conclusion that the Legislature "approved" of the pre-*Rowland* line of cases instituting a judicially created prejudice requirement. First and foremost, legislative acquiescence has been repeatedly repudiated by this Court because it is as an exceptionally poor indicator of legislative intent.[31] When used in a case like this, the theory requires a court to intuit legislative intent not by anything that the Legislature actually enacts, but by the *absence* of action.[32] Yet "a legislature legislates by legislating, not by doing nothing, not by keeping silent."[33] Thus, the doctrine of legislative acquiescence "is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that

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[31] See, e.g., *Rowland*, 477 Mich at 209 n 8; *Donajkowski v Alpena Power Co*, 460 Mich 243, 258-261; 596 NW2d 574 (1999), quoting *Rogers v Detroit*, 457 Mich 125, 163-166; 579 NW2d 840 (1998) (TAYLOR, J., dissenting); *Autio v Proksch Constr Co*, 377 Mich 517, 527-539; 141 NW2d 81 (1966); *Van Dorpel v Haven-Busch Co*, 350 Mich 135, 145-149; 85 NW2d 97 (1957), quoting in part *Sheppard v Mich Nat'l Bank*, 348 Mich 577, 599; 83 NW2d 614 (1957) (SMITH, J., concurring).

[32] The dissent's own language demonstrates how amorphous and unprincipled the theory of legislative acquiescence is. The dissent reasons that " '[t]here was the possibility of change. Because it did not occur, it is reasonable to deduce that the Legislature's inaction has been intentional.' " *Post* at 756, quoting *Rowland*, 477 Mich at 263 (MARILYN KELLY, J., concurring in part and dissenting in part). We find nothing whatsoever reasonable about this "deduction" that the failure to act on a mere "possibility" of change necessarily equates to affirmative approval. See *Donajkowski*, 460 Mich at 259-260 (setting forth more than a dozen reasons why a legislature may fail to correct an erroneous judicial decision).

[33] *Wycko v Gnodtke*, 361 Mich 331, 338; 105 NW2d 118 (1960).

Michigan courts determine the Legislature's intent from its *words*, not from its silence."[34]

Notwithstanding these inherent problems with the theory of legislative acquiescence, its use in this case is particularly unavailing. As we explained in *Rowland*, "[i]n reading an 'actual prejudice' requirement into the statute, this Court not only usurped the Legislature's power but simultaneously *made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible*."[35] This reasoning applies with equal force here. As noted earlier, the pre-*Rowland* cases instituted prejudice requirements for statutory notice provisions on the mistaken belief that those requirements were necessary as *a matter of constitutional law*. As the dissent is well

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[34] *Donajkowski*, 460 Mich at 261.

Notably, the dissent ascribes no significance to the fact that *Rowland* has been the law of this state for approximately five years, and in that time the Legislature has not acted to add prejudice requirements to various statutory notice provisions. Apparently for the dissent, the Legislature's alleged acquiescence in the decisions overruled by *Rowland* is deserving of greater deference here than any current "acquiescence" in the governing construction. Compare also *People v Lown*, 488 Mich 242; 794 NW2d 9 (2011) (MARILYN KELLY, J., dissenting), in which the dissenting justice argued that the Court should overrule a 1959 decision of this Court interpreting MCL 780.131 and MCL 780.133 without any mention or apparent regard of more than 50 years of legislative "acquiescence" in that decision. We are unclear what principle demarcates when the theory should be selectively employed as dispositive of legislative intent in one case but not another, and the dissent does not take this opportunity to elucidate. Cf. *Paige v Sterling Hts*, 476 Mich 495, 516-518; 720 NW2d 219 (2006) (criticizing the dissent's "undeniably inconsistent" use of legislative acquiescence); *Autio*, 377 Mich at 527-539 (criticizing the "selective invocation" of legislative acquiescence). Indeed, the theory appears to be employed in certain quarters primarily as "another way of sustaining forever any precedent, no matter how wrongly decided," *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 760 n 15; 641 NW2d 567 (2002), and in this regard it is truly "a pernicious evil designed to relieve a court of its duty of self-correction," *Autio*, 377 Mich at 527.

[35] *Rowland*, 477 Mich at 213 (emphasis added).

aware, "[c]onstruction of the Constitution is the province of the courts and this Court's construction of a State constitutional provision is binding on all departments of government, including the legislature."[36] As a result, one can hardly equate the Legislature's inaction with legislative approval of the pre-*Rowland* judicial prejudice requirement given that this Court's pre-*Rowland* decisions mandated the prejudice requirements for notice provisions lest they be struck down as unconstitutional.[37] Thus, the dissent relies on a Catch-22: that the Legislature "acquiesced" in constructions of statutes that this Court deprived it of the power to amend.[38] The striking illogic of this argument demands that it once again be repudiated, as it was in *Rowland*.

V. CONCLUSION

Plaintiff's accident occurred on December 12, 2007. Because her action is for personal injuries, MCL

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[36] *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968).

[37] The dissent nevertheless persists in this argument, curiously asserting that "the Legislature could have amended notice requirements in conformity with *Hobbs* and *Brown* and chose not to do so." *Post* at 761. Yet it would be more than passing strange for the Legislature to amend notice statutes "in conformity with *Hobbs* and *Brown*" if the amendments that the Legislature wanted were the *opposite* of what would have been constitutionally permitted by those cases.

[38] The dissent bemoans the fact that we criticize its use of legislative acquiescence, asserting that "[j]udges are free to pick and choose the interpretive tools with which they engage in statutory interpretation." *Post* at 757 n 22. Whatever the merits of this argument, where our dissenting colleague can provide no generalized theory that allows one to predict when she will or will not invoke legislative acquiescence, it is perfectly appropriate to highlight the problems with the dissenting justice's methodology of deciding cases. Not all methods of interpretation are of equal value, and highlighting the problems seems particularly appropriate when the method employed results in a construction that is *contrary* to clear statutory language, as is the case here.

600.6431(3) required that she file her claim or a notice of intent to file her claim "with the clerk of the court of claims" within six months, or by June 12, 2008. She did not file notice with the clerk until October 31, 2008. Because plaintiff did not comply with the plain language of the notice filing requirement provided in MCL 600.6431, that statute precludes her from maintaining her claim against the university.

The decision of the Court of Appeals is affirmed.

MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

MARILYN KELLY, J. (*dissenting*). The question presented in this case is similar to that in *Atkins v Suburban Mobility Authority for Regional Transportation*[1] and is hardly novel. At issue is whether plaintiff's failure to comply with a statutory notice requirement mandates entry of summary disposition in favor of defendant University of Michigan Regents. The majority concludes that, consistently with *Rowland v Washtenaw County Road Commission*,[2] MCL 600.6431 must be strictly enforced. Hence, the fact that plaintiff provided actual notice to defendant rather than notice that complied in every detail with the statute requires that her entire claim be dismissed. The majority further declares that *Rowland*'s reasoning applies to all statutory notice or filing provisions, not just those in MCL 600.6431. Because I disagree both with the majority's application of MCL 600.6431 and its unrestrained extension of *Rowland* to statutes not before the Court, I respectfully dissent.

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[1] *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707; 822 NW2d 522 (2012).

[2] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

ANALYSIS

The proper interpretation and application of statutory notice provisions like MCL 600.6341[3] have long occupied our courts. While early decisions of our Court strictly construed notice provisions and allowed dismissal for failure to comply,[4] the Court changed course in 1970 in *Grubaugh v City of St Johns*.[5] In *Grubaugh*, the Court dealt with a statutory provision that required a plaintiff to give a governmental defendant notice of a claim within 60 days of the incident underlying the lawsuit. The Court determined that the provision violated the Due Process Clause of the state constitution.[6]

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[3] MCL 600.6431 provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> * * *
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

I agree with the majority's underlying conclusion that a reasonable person reading the statute would understand that subsections (1) and (3) are related and interdependent. Accordingly, the statute provides a six-month period for a plaintiff to file notice of an impending claim in the Court of Claims.

[4] See, e.g., *Davidson v City of Muskegon*, 111 Mich 454; 69 NW 670 (1897).

[5] *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970).

[6] *Id*. at 176.

Two years later, in *Reich v State Highway Department*, the Court extended *Grubaugh* and held that a statute that included a 60-day notice provision was unconstitutional on equal protection grounds.[7] We reasoned that the state and federal constitutions forbid treating those injured by governmental negligence differently from those injured by a private party's negligence.[8]

The next year, in *Carver v McKernan*,[9] the Court considered the application of a six-month notice provision in the Motor Vehicle Accident Claims Act.[10] The Court retreated somewhat from *Grubaugh*'s and *Reich*'s holdings that statutory notice provisions are per se unconstitutional. *Carver* held that the notice provision at issue in that case was constitutional, and thus enforceable, but only if the plaintiff's failure to give notice prejudiced the party receiving the notice.[11] The Court opined that while some notice provisions may be constitutionally permitted, others may not be, depending on the purpose served by the notice requirement.[12] The Court explained that if the notice provision served some purpose other than to prevent prejudice, it could be considered an unconstitutional legislative requirement.[13]

Three years later, in *Hobbs v Department of State Highways*,[14] the Court reaffirmed the reasoning of *Carver*. Considering a 120-day notice requirement in the governmental tort liability act,[15] the Court held:

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[7] *Reich v State Hwy Dep't*, 386 Mich 617, 623-624; 194 NW2d 700 (1972).

[8] *Id*.

[9] *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973).

[10] MCL 257.1118.

[11] *Carver*, 390 Mich at 100.

[12] *Id*.

[13] *Id*.

[14] *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976).

[15] MCL 691.1404.

> The rationale of *Carver* is equally applicable to cases brought under the governmental liability act. Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in [MCL 691.1404] is not a bar to claims filed [under the act].[16]

Thus, *Hobbs* continued to employ a prejudice standard when construing statutory notice provisions.

Twenty years later, in *Brown v Manistee County Road Commission*,[17] the Court reconsidered the propriety of *Hobbs*. We concluded that the statute at issue in that case was unconstitutional, reasoning that we were "unable to perceive a rational basis for the county road commission statute to mandate notice of a claim within sixty days."[18] We further reasoned that there was no legitimate reason to subject some claimants to a 60-day notice period and others to a 120-day notice period.

Nonetheless, in 2007, four justices of the Court issued *Rowland* and upended *Hobbs*, *Brown*, and their progeny as wrongly decided.[19] Those justices concluded that *Hobbs* and *Brown* erroneously read actual prejudice requirements into statutory notice provisions and, in doing so, usurped the Legislature's power to mandate timely notice to defendants. I dissented with respect to the Court's decision to overrule *Hobbs* and *Brown*. I opined that the Court did not need to reach the validity of those cases in deciding *Rowland* but, in any event, that they had been properly decided. I stated:

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[16] *Hobbs*, 398 Mich at 96.

[17] *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996).

[18] *Id*. at 363.

[19] *Rowland*, 477 Mich at 210-213.

Even if it were proper to reach the 120-day notice requirement in this case, it would not be appropriate to overturn *Hobbs* and *Brown*. Together, these cases represent 30 years of precedent on the proper meaning and application of MCL 691.1404. Such a considerable history cannot be lightly ignored. And the Legislature's failure to amend the statute during this time strongly indicates that *Hobbs* and *Brown* properly effectuated its intent when enacting MCL 691.1404(1).

The primary goal of statutory interpretation is to give effect to legislative intent. In both *Hobbs* and *Brown*, the Court identified the intent behind the notice provision as being to prevent prejudice to a governmental agency. [In *Brown*, the Court held that] [a]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision . . . . For 20 years, the Legislature knew of this interpretation but took no action to amend the statute or to state some other purpose behind MCL 691.1404(1). The Court then readdressed the statute in *Brown* and came to the same conclusion regarding the purpose behind MCL 691.1404(1).

Another ten years have passed, but still the Legislature has taken no action to alter the Court's interpretation of the intent behind the statute. This lack of legislative correction points tellingly to the conclusion that this Court properly determined and effectuated the intent behind MCL 691.1404(1). If the proper intent is effectuated, the primary goal of statutory interpretation is achieved.

* * *

Moreover, if the Legislature truly desired a hard and fast 120-day limit, it could have rewritten the statute to contain a presumption of prejudice. Alternatively, it could have defined actual prejudice in the statute to be more restrictive than *Hobbs* found it to be. There was the possibility of change. Because it did not occur, it is reasonable to deduce that the Legislature's inaction has been intentional.[20]

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[20] *Id*. at 258-259, 263 (MARILYN KELLY, J., concurring in part and dissenting in part) (quotation marks and citations omitted).

I continue to stand by my partial dissent in *Rowland* and believe that, in toppling decades of settled caselaw, the Court acted improperly.[21] I would hold, consistently with *Hobbs* and *Brown*, that preventing actual prejudice to a defendant due to lack of notice is the primary legitimate purpose of statutory notice provisions.[22] Consequently, a suit may be dismissed for lack of notice only when a defendant has been prejudiced by a plaintiff's noncompliance.

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[21] I am cognizant that *Rowland* garnered a bare majority of the Court when decided in 2007. But I did not sign that opinion. By standing by my opinion concurring in part and dissenting in part in *Rowland*, I am not ignoring precedent. Rather, I am consistently recommending the application of the proper interpretation and application of statutory notice provisions. This is not an avant-garde concept. See, e.g., *People v Pearson*, 490 Mich 984 (2012) (YOUNG, C.J., dissenting), in which Chief Justice YOUNG stood by his partial dissent in *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011), and recommended against applying *Bonilla-Machado* despite its controlling effect.

The majority claims that "this case is not a basis to relitigate *Rowland*." *Ante* at 747. I find this statement difficult to fathom considering that the majority relies entirely on an extension of the principles espoused in *Rowland* and "take[s] this opportunity to reaffirm [it]." *Ante* at 732. The majority's claim in this regard is also belied by its explicit reliance on the arguments made by the *Rowland* majority in part III of its opinion.

[22] The majority is troubled by my reliance on legislative acquiescence as support for my conclusion that the Legislature approved of the pre-*Rowland* line of cases. See *ante* at 749-750. Judges are free to pick and choose the interpretive tools with which they engage in statutory interpretation. While four members of this Court may prefer not to consider legislative acquiescence, the tool has a deep-rooted history in the United States Supreme Court as well as in this Court. See, e.g., *Shepard v United States*, 544 US 13, 23; 125 S Ct 1254; 161 L Ed 2d 205 (2005); *Douglass v Pike Co*, 101 US (11 Otto) 677, 687; 25 L Ed 968 (1880); *Twork v Munising Paper Co*, 275 Mich 174, 178; 266 NW 311 (1936); see also *Rowland*, 477 Mich at 260-261 (MARILYN KELLY, J., concurring in part and dissenting in part). Despite the majority's recent rejection of the doctrine, see *People v Likine*, 492 Mich 367, 411 n 96; 823 NW2d 50 (2012), it remains a valid interpretive aid.

In this case, plaintiff provided actual notice to defendant; she failed to provide the notice of intent to bring suit within the six-month period required by MCL 600.6431(3). Applying to it the reasoning of *Hobbs*, *Brown*, and my partial dissent in *Rowland*, I would hold that defendant was not prejudiced by this failure. This is apparent for several reasons.

First, less than five months after the underlying accident, on May 7, 2008, plaintiff's counsel sent a letter to the University of Michigan's legal office. That letter indicated counsel's intent to represent plaintiff in a lawsuit against defendant.

Second, three weeks later, on May 28, 2008, the university's senior claims representative from the Office of Risk Management Services replied to counsel's letter. The representative advised plaintiff's counsel that the university intended to conduct a full investigation into plaintiff's accident. Furthermore, the representative requested additional information, including a statement by plaintiff, medical records, medical bills, and other details pertaining to the accident. The representative's letter stated that once a full investigation was complete, the university would discuss resolution of plaintiff's claim. The representative also sent the letter to the university's assistant general counsel.

Third, on June 9, 2008, plaintiff agreed to meet with the representative to provide a statement describing her accident. She did so and left a copy of all documentary materials available at that time, including the police report and medical records. In September and October 2008, plaintiff provided new documentation of her injuries and treatment to the representative.

The information plaintiff provided put defendant on notice of plaintiff's claim against it. This is not a case of a failure to substantially comply with a notice require-

ment. Plaintiff substantially complied with MCL 600.6431(3) and, as the record indicates, defendant was *actually* aware that plaintiff had retained counsel to pursue a lawsuit against it. Defendant was also fully apprised of all details relevant to plaintiff's suit within the six-month period following her accident. Indeed, through its representative, defendant actively communicated with plaintiff and her counsel within the six-month-notice period. Accordingly, defendant had actual notice of her claim. Moreover, it suffered no prejudice when plaintiff filed notice of its lawsuit in the Court of Claims several months after expiration of the six-month-notice period. I reject the notion that slavish adherence to form must be shown in this case when the legislative purpose of the notice requirement was so clearly fulfilled.

The majority also applies *Rowland*'s reasoning to all similar statutory notice provisions, even those not presently before the Court.[23] I disagree. Our Court resolves disputes on a case-by-case basis and does not issue rulings regarding statutes or issues not before it. To the extent that the Court attempts to construe statutes that are not at issue in this case by extending *Rowland*'s reasoning, its attempt amounts to nothing more than dicta.

RESPONSE TO THE MAJORITY

The majority notes that the Legislature has not amended various statutory notice provisions during the five years since *Rowland* was decided. It concludes that my dissent should acknowledge that the Legislature has thereby acquiesced in no prejudice requirement being attached to these provisions.

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[23] See *ante* at 746.

But the majority ignores an important fact: *Rowland* applied to the notice provision in the highway exception to governmental immunity.[24] No other notice provision. In fact, the majority admits that, at best, any broader application has been unclear during these past five years.[25] If the Legislature did not know that *Rowland* applied to the notice provisions of the Court of Claims Act, it can hardly be said to have acquiesced in the Court's having removed a prejudice component from those provisions.

The majority criticizes me for refusing to disregard the obvious fact that defendant here had actual and timely notice that fulfilled the intent of MCL 600.6431. Moreover, it is unconcerned that defendant can show no prejudice whatsoever in not receiving additional notice that conformed to the letter of the provision.

The majority also accuses me of selectively applying the doctrine of legislative acquiescence to suit an intended result.[26] In so doing, the majority invests my dissent with a position it has never taken and then belittles the dissent for having taken it. I have never taken the position that, if the Legislature does not amend a statute after the Court interprets it, the Legislature must be held to have acquiesced in the Court's interpretation. Rather, my position is that the Legislature's failure to amend is evidence of acquiescence; it is not conclusive proof.

Legislative acquiescence is a tool, a factor to be weighed in the balance when the Court interprets a statute. When the Court's interpretation is longstanding, clear, and well understood, as in the case of *Hobbs*

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[24] See MCL 691.1404(1).

[25] See *ante* at 745.

[26] *Ante* at 751 n 38.

and *Brown*, which *Rowland* overturned, the doctrine of legislative acquiescence should weigh more heavily. Contrast that with cases in which the Court's interpretation is longstanding but has been heavily eroded by subsequent rulings. That was the condition of *People v Hendershot*,[27] which I would have overruled in *People v Lown*.[28] The doctrine of legislative acquiescence weighed less heavily on the scales in *Lown*.

The majority further asserts that this Court's pre-*Rowland* decisions mandated a prejudice component in notice requirements lest they be struck down as unconstitutional. Hence, it reasons, the Legislature could not have amended notice provisions to eliminate a prejudice component. But the majority fails to realize that the Legislature could have amended notice requirements in conformity with *Hobbs* and *Brown* and chose not to do so. The majority's argument here was also made in criticism of my dissent in *Rowland*.[29] My response is the same now as it was then.

The majority also criticizes me for failing to provide a "generalized theory that allows one to predict when [I] will . . . invoke legislative acquiescence . . . ."[30] I find that its preference for a generalized theory to predict when I will invoke legislative acquiescence is an invitation to a field trip. Accepting it would only draw me away from the pertinent question: did the notice plaintiff gave defendant in this case satisfy the Legislature's intent in enacting MCL 600.6431? I have shown that it did.

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[27] *People v Hendershot*, 357 Mich 300; 98 NW2d 568 (1959).

[28] *People v Lown*, 488 Mich 242, 282-287; 794 NW2d 9 (2011) (MARILYN KELLY, J., dissenting).

[29] See *Rowland*, 477 Mich at 209 n 8.

[30] *Ante* at 751 n 38.

CONCLUSION

I would reverse the judgment of the Court of Appeals. I would hold that plaintiff's failure to file notice of her suit in the Court of Claims within six months of the incident giving rise to her suit does not mandate summary disposition in favor of defendant. Defendant had actual timely notice and was not prejudiced by plaintiff's failure to file the notice described in MCL 600.6431. The intent of the Legislature was satisfied. For these reasons, the Court should set aside the grant of summary disposition and remand plaintiff's case to the trial court for further proceedings. Accordingly, I respectfully dissent.

CAVANAGH, J., concurred with MARILYN KELLY, J.

HATHAWAY, J., concurred with MARILYN KELLY, J., except for the part of the opinion entitled "Response to the Majority."

PROTECT OUR JOBS v BOARD OF STATE CANVASSERS

MICHIGAN ALLIANCE FOR PROSPERITY v BOARD OF STATE CANVASSERS

CITIZENS FOR MORE MICHIGAN JOBS v SECRETARY OF STATE

THE PEOPLE SHOULD DECIDE v BOARD OF STATE CANVASSERS

Docket Nos. 145748, 145753, 145754, and 145755. Argued August 30, 2012. Decided September 5, 2012.

Protect Our Jobs, a ballot question committee, brought an action in the Court of Appeals, seeking a writ of mandamus directing the Board of State Canvassers and the Director of Elections to place on the November 2012 general election ballot its proposal for amendments of the Constitution that provide for and protect various collective-bargaining rights. The board had approved the form of the petition and the director had found that there were sufficient valid signatures to qualify the petition, but the board deadlocked on whether the petition should be placed on the ballot, with two members voting to do so and two voting against. Under MCL 168.22d(2), the proposal therefore did not qualify for placement on the ballot. In an unpublished order entered August 16, 2012 (Docket No. 311828), the Court of Appeals granted a motion to intervene filed by Citizens Protecting Michigan's Constitution (CPMC), another ballot question committee. The Court of Appeals, OWENS, P.J., and RONAYNE KRAUSE, J. (O'CONNELL, J., dissenting), granted mandamus in an unpublished opinion per curiam issued August 27, 2012 (Docket No. 311828), and ordered the board and director to take the necessary steps to place the proposal on the ballot. The Supreme Court ordered and heard oral argument on whether to grant CPMC's application for leave to appeal or take other peremptory action, directing the parties to address whether the requirements of Const 1963, art 12, § 2 and MCL 168.482(3) that petitions set forth any other existing provisions of the Constitution that would be altered or abrogated by the proposed amendment had been satisfied. 492 Mich 862 (2012).

Michigan Alliance For Prosperity, a ballot question committee, brought an action in the Court of Appeals, seeking a writ of

mandamus directing the board, the director, and the Secretary of State to place on the ballot its proposal for amendments of the Constitution that would require a 2/3 majority of both houses of the Legislature or a statewide vote to raise taxes or enact a new tax. The board had voted 2-1 in favor of certifying the petition, but the proposal did not qualify for placement on the ballot under the requirements of MCL 168.22d(2) because at least one member from each major political party had not concurred. Michigan Alliance also sought leave to appeal in the Supreme Court under MCR 7.302(C) before a decision by the Court of Appeals with respect to its complaint and further sought mandamus in the Supreme Court. Defend Michigan Democracy, another ballot question committee, moved to intervene in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action, directing the parties to address whether the requirements of Const 1963, art 12, § 2 and MCL 168.482(3) had been satisfied. 492 Mich 862 (2012).

Citizens for More Michigan Jobs (CFMMJ), a ballot question committee, sought to place on the ballot its proposal for amendments of the Constitution that would expand casino gaming in Michigan by allowing eight additional casinos in the state. Protect MI Constitution (PMC), another ballot question committee, brought an action in the Court of Appeals, seeking a writ of mandamus directing the Secretary of State to reject the petition. The Court of Appeals granted CFMMJ's motion to intervene in an unpublished order entered August 2, 2012 (Docket No. 311504). Subsequently, the Court of Appeals, OWENS, P.J., and O'CONNELL, J. (RONAYNE KRAUSE, J., concurring in part and dissenting in part), granted mandamus and ordered the Secretary of State to reject the petition and not allow the proposal on the ballot, concluding that the petition violated Const 1963, art 4, § 25, which states that a law may not be altered, revised, or amended without republication of the affected statutes. *Protect MI Constitution v Secretary of State*, 297 Mich App 553 (2012). In lieu of granting CFMMJ's application for leave to appeal, the Supreme Court reversed and vacated the Court of Appeals' mandamus order, concluding that Const 1963, art 4, § 25 did not apply to constitutional amendments. The Supreme Court directed the Secretary of State, the board, and the director to proceed. 492 Mich 860 (2012). The board subsequently voted 2-1 in favor of approving placement of the proposal on the ballot, but the proposal did not qualify under MCL 168.22d(2) for placement on the ballot because at least one member from each major political party had not concurred. CFMMJ and Robert J. Cannon (a qualified, regis-

tered voter) brought an action in the Court of Appeals, seeking a writ of mandamus directing the Secretary of State, the board, and the director to take all steps necessary to place the proposal on the ballot and also sought leave to appeal in the Supreme Court under MCR 7.302(C) before a decision by the Court of Appeals with respect to its complaint. PMC moved to intervene in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action, directing the parties to address whether the requirements of Const 1963, art 12, § 2 and MCL 168.482(3) had been satisfied. 492 Mich 862 (2012).

The People Should Decide (TPSD), a ballot question committee, brought an action in the Court of Appeals, seeking a writ of mandamus directing the board, the director, and the Secretary of State to place on the ballot its proposal for amendments of the Constitution that would require a statewide vote to approve the use of state funds with respect to a new international bridge or tunnel. The board subsequently voted 2-1 in favor of approving placement of the proposal on the ballot, but the proposal did not qualify under MCL 168.22d(2) for placement on the ballot because at least one member from each major political party had not concurred. TPSD also sought leave to appeal in the Supreme Court under MCR 7.302(C) before a decision by the Court of Appeals with respect to its complaint and filed a complaint for mandamus in the Supreme Court. Taxpayers Against Monopolies, another ballot question committee, moved to intervene in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other peremptory action, directing the parties to address whether the requirements of Const 1963, art 12, § 2 and MCL 168.482(3) had been satisfied. 492 Mich 862 (2012).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN and MARY BETH KELLY, the Supreme Court *held*:

Const 1963, art 12, § 2 and MCL 168.482(3) require republication of any existing provisions of the Constitution that a proposed constitutional amendment would alter or abrogate. An amendment would alter an existing provision only when the amendment would actually add to, delete from, or change the existing wording of the provision, and an amendment would abrogate an existing provision only when it would render that provision wholly inoperative.

1. Const 1963, art 12, § 2 governs the amendment of the Constitution by petition and vote. It requires in part that existing

provisions of the Constitution that would be altered or abrogated by the proposed amendment be published in full as provided by law. MCL 168.482(3) sets forth the requirements for a petition seeking an amendment. It requires that the petition state that a constitutional provision would be altered or abrogated and further requires that the provision that would be altered or abrogated be inserted in the petition. Const 1963, art 12, § 2 and MCL 168.482(3) together establish the requirements for publishing existing constitutional provisions. Petition supporters must fully comply with the requirement that the petition republish any existing constitutional provision that the proposed amendment would alter or abrogate.

2. The phrase "existing wording" in Const 1963, art 12, § 2 refers to the actual text of an existing constitutional provision. Thus, the language of the amendment itself, rather than how proponents or opponents of the amendment characterize its meaning, controls whether an existing provision would be altered or abrogated by the proposed amendment.

3. A proposed amendment would alter an existing provision and republication is required only if the proposed amendment would actually (1) add words to, (2) delete words from, or (3) change the wording of an existing provision. There are no de facto or indirect additions to, deletions from, or changes in an existing provision, however, and the fact that a proposed amendment might have a direct and obvious effect on the understanding of an existing provision is an insufficient basis from which to conclude that the proposed amendment would alter an existing constitutional provision. Therefore, offering an amendment as a new provision is dispositive on the issue of alteration. A new provision could not alter an existing provision (though it might abrogate an existing provision) when the new provision would leave the text of all other existing provisions completely intact.

4. When the existing language of a constitutional provision would not be altered, abrogation would nonetheless occur and republication of the existing language is required if the proposed amendment would render the entire provision or some discrete component of it wholly inoperative. This would occur if the amendment would make the existing provision a nullity or it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together. An existing provision is not rendered wholly inoperative if it can be construed consistently with the new provision. Determining whether the existing and new provisions can be harmonized requires careful consideration of the actual language used in both

the existing provision and the proposed amendment. Determining whether abrogation will occur requires consideration of not just the whole existing constitutional provision, but also the provision's discrete subparts, sentences, clauses, or, potentially, single words. An existing provision that uses nonexclusive language or language that is not absolute would be less likely to be rendered inoperative simply because a proposed new provision will introduce in some manner a change to the existing provision. Rather, if the existing provision would likely continue to exist as it did before the amendment even though it might be affected or supplemented in some fashion, no abrogation would occur. A proposed amendment would more likely render an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to that provision would tend to negate the specifically conferred constitutional requirement.

5. In *Protect Our Jobs v Board of State Canvassers*, the proposed collective-bargaining amendment would not alter an existing constitutional provision because it would leave the current text of both § 48 and § 49 of article 4 of the 1963 Constitution completely intact. Nor would it abrogate either section because while the proposed amendment would allow collective-bargaining agreements to limit the Legislature's power under those sections, the Legislature would nonetheless retain that nonexclusive power and neither section would be rendered wholly inoperative.

6. In *The People Should Decide v Board of State Canvassers*, the proposed bridge amendment, which would add a new article 3, § 6a to the Constitution, would not alter the text of Const 1963, art 2, § 9; art 3, § 6; or art 7, § 16. Moreover, article 2, § 9 and article 3, § 6 would remain fully operative, and the scope of the Legislature's nonexclusive powers to provide for various infrastructure projects under article 7, § 16 would only be limited by the requirement of a vote before construction of certain bridges.

7. In *Michigan Alliance for Prosperity v Board of State Canvassers*, the proposed amendment to require a 2/3 vote to raise taxes would not alter the text of Const 1963, art 9, §§ 1, 2, 3, 6, or 26. Nor would it abrogate those sections. In particular, with respect to article 9, §§ 1 and 2, the amendment would not negate the Legislature's power with respect to taxes, but would simply require a larger majority to exercise that power. Moreover, the people reserved to themselves the broad power to enact laws coextensive with the power of the Legislature. With respect to article 9, § 3, which requires a 3/4 vote to increase ad valorem

taxes for school operations, any vote that satisfies the existing 3/4 requirement would necessarily satisfy the proposed 2/3 requirement.

8. In *Citizens for More Michigan Jobs v Secretary of State*, the proposed casino amendment would not alter Const 1963, art 4, § 40, which vests exclusive control over alcoholic-beverage traffic in the Liquor Control Commission. Because the amendment would require the granting of liquor licenses to the new casinos, however, it would nullify the complete control currently afforded to the commission and thus would abrogate that constitutional provision. The failure to republish article 4, § 40 was fatal to the proposed amendment, and mandamus could not be ordered.

Court of Appeals' judgment affirmed in *Protect Our Jobs*.

Relief on complaints for mandamus granted in part in *Michigan Alliance* and *People Should Decide*, and defendants directed to proceed as necessary to place the proposed amendments on the ballot.

Complaint for mandamus in the Court of Appeals dismissed in *Citizens for More Michigan Jobs*.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, concurring in part and dissenting in part, concurred in the result reached in *Protect Our Jobs*, *Michigan Alliance*, and *People Should Decide*, but dissented from the result reached in *Citizens for More Michigan Jobs*. The amendment proposed in that case would neither alter nor abrogate Const 1963, art 4, § 40. The Liquor Control Commission's control over alcoholic-beverage traffic is neither complete nor exclusive, but is subject to limits that the Legislature chooses to place on it, and if the Legislature may subject the commission's control to limitations, then so may the people of this state. The people of the state have an inherent and superior right to amend the Constitution and alter the authority of that legislatively created commission. Because article 4, § 40 would not be altered or abrogated, there was no need for the petition to satisfy the republication requirement. Justice KELLY would have granted relief on the complaint for mandamus and directed the Secretary of State, the board, and the director to take the necessary steps to place the proposed amendment on the ballot.

1. ELECTIONS — CONSTITUTIONAL AMENDMENTS — BALLOT PROPOSALS — ALTERATION OF EXISTING PROVISIONS — ABROGATION OF EXISTING PROVISIONS — REPUBLICATION.

Const 1963, art 12, § 2 and MCL 168.482(3) require that the petition for a proposed constitutional amendment republish any existing provisions of the Constitution that the proposed amendment

would alter or abrogate; an amendment would alter an existing provision only when the amendment would actually add to, delete from, or change the existing wording of the provision, that is, the actual text of the provision, and an amendment would abrogate an existing provision only when it would render that provision wholly inoperative.

2. ELECTIONS — CONSTITUTIONAL AMENDMENTS — BALLOT PROPOSALS — ALTERATION OF EXISTING PROVISIONS — REPUBLICATION.

A proposed constitutional amendment would alter an existing constitutional provision and republication of that provision on the petition is required if the proposed amendment would actually (1) add words to, (2) delete words from, or (3) change the wording of the provision, but absent that, the fact that a proposed amendment might have a direct and obvious effect on the understanding of an existing provision is an insufficient basis from which to conclude that the proposed amendment would alter the existing provision; offering an amendment as a new provision is dispositive on the issue of alteration because a new provision could not alter an existing provision (though it may abrogate an existing one) (Const 1963, art 12, § 2; MCL 168.482[3]).

3. ELECTIONS — CONSTITUTIONAL AMENDMENTS — BALLOT PROPOSALS — ABROGATION OF EXISTING PROVISIONS — REPUBLICATION.

A proposed constitutional amendment would abrogate an existing constitutional provision and republication of that provision on the petition for the proposed amendment is required if the proposed amendment would render an entire existing constitutional provision or some discrete component of it wholly inoperative, which would occur if the amendment would make the existing provision a nullity or it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together; an existing provision is not rendered wholly inoperative if it can be construed consistently with the new provision; determining whether abrogation will occur requires consideration of not just the whole constitutional provision, but also the provision's discrete subparts, sentences, clauses, or, potentially, single words; an existing provision that uses nonexclusive language or language that is not absolute would be less likely to be rendered inoperative simply because a proposed new provision will introduce in some manner a change to the existing provision; if the existing provision would likely continue to exist as it did before the amendment even though it might be affected or supplemented in some fashion, no abrogation would occur; a proposed amendment would more likely render an existing provi-

> sion inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to that provision would tend to negate the specifically conferred constitutional requirement (Const 1963, art 12, § 2; MCL 168.482[3]).

Sachs Waldman, P.C. (by *Andrew Nickelhoff*), for Protect Our Jobs.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, *Heather S. Meingast*, *Ann M. Sherman*, and *Denise C. Barton*, Assistant Attorneys General, for the Board of State Canvassers and the Director of Elections in *Protect Our Jobs*.

Dykema Gossett PLLC (by *Gary P. Gordon*, *Leonard C. Wolfe*, *Jason T. Hanselman*, and *Courtney F. Kissel*) for Citizens Protecting Michigan's Constitution.

Witte Law Offices (by *Matthew G. Davis*) for Michigan Alliance for Prosperity.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, *Denise C. Barton*, *Heather S. Meingast*, and *Ann M. Sherman*, Assistant Attorneys General, for the Board of State Canvassers, the Director of Elections, and the Secretary of State in *Michigan Alliance*.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for Defend Michigan Democracy.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Jonathan E. Raven* and *Graham K. Crabtree*), for Citizens for More Michigan Jobs and Robert J. Cannon.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, *Ann M. Sherman* and *Denise*

C. Barton, Assistant Attorneys General, for the Secretary of State, the Board of State Canvassers, and the Director of Elections in *Citizens for More Michigan Jobs*.

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) and *Honigman Miller Schwartz and Cohn LLP* (by *John D. Pirich* and *Andrea L. Hansen*) for Protect MI Constitution.

Kerr, Russel and Weber, PLC (by *Joanne Geha Swanson*), *Gerald Fisher*, *Nedelman Legal Group PLLC* (by *Michael A. Nedelman*), and *Stephen J. Safranek* for The People Should Decide.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, *Heather S. Meingast* and *Denise C. Barton*, Assistant Attorneys General, for the Board of State Canvassers, the Director of Elections, and the Secretary of State in *People Should Decide*.

Miller Canfield Paddock and Stone, PLC (by *Michael J. Hodge*, *William J. Danhof*, and *Scott R. Eldridge*), and *Honigman Miller Schwartz and Cohn LLP* (by *John D. Pirich* and *Andrea L. Hansen*) for Taxpayers Against Monopolies.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Richard A. Bandstra*, Chief Legal Counsel, for the Attorney General and the Governor in *Protect Our Jobs*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Richard A. Bandstra*, Chief Legal Counsel, for the Attorney General in *Citizens for More Michigan Jobs*.

Richard D. McLellan for William Birdseye and the Police Officers Association of Michigan in *Citizens for More Michigan Jobs*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Richard A. Bandstra*, Chief Legal Counsel, for the Governor in *People Should Decide*.

ZAHRA, J. Article 1, § 1 of Michigan's Constitution states: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."[1] Within our Constitution, the people have allocated certain portions of their inherent powers to the branches of government. But the people have also reserved certain powers to themselves. Among these powers is the right to amend the Constitution by petition and popular vote.[2] This Court has consistently protected the right of the people to amend their Constitution in this way, while enforcing constitutional and statutory safeguards that the people placed on the exercise of that right. Nearly one century ago we recognized that

> [o]f the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises. But the right is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution.[3]

These four cases, each involving a ballot proposal to amend the Michigan Constitution, ask us to decide whether the groups proposing the amendments prop-

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[1] Const 1963, art 1, § 1.

[2] Const 1963, art 12, § 2.

[3] *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918).

erly exercised their right to petition for constitutional amendments in compliance with the constitutional and statutory safeguards. Specifically, these cases present the issue whether the petitions for each proposal satisfied the requirement under Const 1963, art 12, § 2 and MCL 168.482(3) to republish any existing provisions of the Constitution that the proposed amendment would alter or abrogate. We reaffirm our prior caselaw holding that an existing provision is only altered when the amendment actually adds to, deletes from, or changes the wording of the provision. We further reaffirm that an amendment only abrogates an existing provision when it renders that provision wholly inoperative.

Applying the meanings of "alter" and "abrogate" to the cases at hand, we conclude that none of the ballot proposals alter an existing provision of the Constitution because none of them actually "add to, delete from, or change the existing wording of the provision . . . ."[4] In addition, we conclude that only the ballot proposal relating to casinos in *Citizens for More Michigan Jobs v Secretary of State* (Docket No. 145754) abrogates an existing constitutional provision. Specifically, the casino amendment's requirement that the casinos authorized by the amendment "shall be granted" liquor licenses by the state of Michigan renders wholly inoperative the "complete control of the alcoholic beverage traffic within this state" afforded to the Liquor Control Commission under an existing provision of the Constitution—Const 1963, art 4, § 40. Therefore, article 4, § 40 was required to be republished on the petition to inform the people of this abrogation.

Accordingly, in *Protect Our Jobs v Board of State Canvassers* (Docket No. 145748), we affirm the judgment of the Court of Appeals granting relief on the

[4] *Ferency v Secretary of State*, 409 Mich 569, 597; 297 NW2d 544 (1980).

complaint for mandamus. In *Michigan Alliance for Prosperity v Board of State Canvassers* (Docket No. 145753) and *The People Should Decide v Board of State Canvassers* (Docket No. 145755), we grant relief on the complaints for mandamus in part and direct the Secretary of State, the Board of State Canvassers, and the Director of Elections to proceed as necessary to place the proposed constitutional amendments on the November 2012 election ballot. We deny relief in all other respects. In *Citizens for More Michigan Jobs*, we dismiss the complaint for mandamus filed in the Court of Appeals and deny relief in all other respects.

I. BACKGROUND

In each of these four cases, ballot question committees have proposed amendments of the 1963 Michigan Constitution. Each committee has obtained the required number of valid signatures for placement on the ballot. But each proposal was challenged before the Board of State Canvassers. Although the proposed amendments pertain to different subjects, the common argument challenging the proposals that we are considering concerns whether any of the proposed amendments will alter or abrogate an existing constitutional provision that was not republished on the petition.[5]

In *Protect Our Jobs*, the ballot question committee Protect Our Jobs proposes an amendment that would enshrine certain collective-bargaining rights in the Con-

[5] On August 30, 2012, this Court heard oral argument on the applications for leave to appeal, addressing whether the republication requirements of Const 1963, art 12, § 2 and MCL 168.482(3), requiring that petitions set forth any other existing provisions of the Constitution that would be altered or abrogated by the proposed amendment, had been satisfied. Our opinion today is based on this issue alone. We are not persuaded that any party is entitled to relief on any of the other grounds raised before the Court.

stitution. Its petition was challenged at the Board of State Canvassers by Citizens Protecting Michigan's Constitution. Because the board refused to certify the proposal for the ballot, Protect Our Jobs sought a writ of mandamus in the Court of Appeals. The Court of Appeals granted the writ of mandamus,[6] which led Citizens Protecting Michigan's Constitution to file the instant application.

In *Citizens for More Michigan Jobs*, the ballot question committee Citizens for More Michigan Jobs proposes an amendment that would allow for the construction of eight new casinos in Michigan and designate their locations. Its petition was challenged by Protect MI Constitution, which sought a writ of mandamus in the Court of Appeals directing the Secretary of State to reject the ballot petition for a constitutional amendment. The Court of Appeals granted the requested relief.[7] This Court reversed the judgment of the Court of Appeals and vacated that Court's order of mandamus, concluding that the constitutional amendment proposal is not an improper attempt to amend a statute and, thus, that the failure to publish an affected statute on the petition was not fatal to the proposal.[8] This Court ordered the Secretary of State, the Board of State Canvassers, and the Director of Elections to proceed.[9] Upon consideration by the board, Protect MI Constitution again challenged the proposal on alternative grounds, and the board refused to certify it for the ballot. Citizens for More Michigan Jobs filed a com-

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[6] *Protect Our Jobs v Bd of State Canvassers*, unpublished opinion per curiam of the Court of Appeals, issued August 27, 2012 (Docket No. 311828).

[7] *Protect MI Constitution v Secretary of State*, 297 Mich App 553; 824 NW2d 299 (2012).

[8] *Protect MI Constitution v Secretary of State*, 492 Mich 860 (2012).

[9] *Id*.

plaint for mandamus in the Court of Appeals and an emergency bypass application for leave to appeal in this Court.

In *Michigan Alliance for Prosperity*, the ballot question committee Michigan Alliance for Prosperity proposes an amendment that requires a 2/3 vote of the Legislature or a vote of the people before any tax increase can be approved. At the Board of State Canvassers, the proposal was challenged by Defend Michigan Democracy. The board refused to certify the proposal for the ballot, and Michigan Alliance for Prosperity filed a complaint for mandamus in the Court of Appeals and an emergency bypass application for leave to appeal in this Court.

Lastly, in *The People Should Decide*, the ballot question committee The People Should Decide proposes an amendment that would require a popular vote before any new international bridge could be constructed. The proposal was challenged at the Board of State Canvassers by Taxpayers Against Monopolies. The board refused to certify the proposal for the ballot, and The People Should Decide filed a complaint for mandamus in the Court of Appeals and an emergency bypass application for leave to appeal in this Court.

As stated, there is no dispute that all four proposals have garnered sufficient signatures to be placed on the ballot. All that is left to decide before the proposed constitutional amendments may be placed on the November general election ballot is whether the petitions themselves complied with the constitutional and statutory safeguards that had to be satisfied.

II. ANALYSIS

The challengers' arguments largely center on Const 1963, art 12, § 2 and MCL 168.482. Article 12, § 2 of the

1963 Michigan Constitution, which governs amendment of the Constitution by petition and vote, provides:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. *Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.* The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.
>
> Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. *Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law.* Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.
>
> The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.
>
> If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the

> date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail. [Emphasis added.]

The Legislature accepted the Constitution's invitation to set forth publishing requirements for petitions. Relevant here, MCL 168.482(3) provides, in part:

> *If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted*, preceded by the words:
>
> "Provisions of existing constitution altered or abrogated by the proposal if adopted." [Emphasis added.]

Const 1963, art 12, § 2 and MCL 168.482(3) together establish the requirements for publishing existing constitutional provisions. In *Stand Up For Democracy v Board of State Canvassers*,[10] this Court held that a petition must fully comply with mandatory statutory provisions that pertain to a petition's requirements regarding form. MCL 168.482(3) uses the mandatory language "shall." Accordingly, the principle articulated in *Stand Up* applies with equal force here and, thus, the petition supporters must fully comply with the requirement that the petition republish any existing constitutional provision that the proposed amendment, if adopted, would alter or abrogate.

This Court has addressed and consistently defined the language "altered or abrogated" in the context of both the Constitution and the statute. In *School District of City of Pontiac v City of Pontiac*,[11] we first addressed the meaning of "altered or abrogated" as

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[10] *Stand Up For Democracy v Bd of State Canvassers*, 492 Mich 588, 594, 601-602, 619; 822 NW2d 159 (2012) (opinion by MARY BETH KELLY, J.); *id*. at 620, 622-623 (opinion by YOUNG, C.J.); *id*. at 637, 640 (opinion by MARKMAN, J.).

[11] *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338, 344; 247 NW 474 (1933).

those terms appeared in an analogous provision of our 1908 Constitution.[12] The amendment at issue in *Pontiac* was designed to limit the amount of property taxes that the Legislature could assess.[13] Its opponents argued that the amendment altered or abrogated provisions of the Constitution that allowed the Legislature to levy taxes, but the proposed amendment had failed to republish those provisions.[14] This Court stated in response to these objections:

> That in case a proposed constitutional provision amends or replaces ("alters or abrogates") a specific provision of the Constitution, that such provision should be published along with the proposed amendment; that other provisions which are still operative, though possibly they may need thereafter to be construed in conjunction with the amending provision, need not necessarily be published.[15]

Accordingly, this Court held that because the challenged amendment created an entirely new section of the Constitution that left unaffected the wording of other provisions, no alteration or abrogation had occurred.[16]

In *Ferency v Secretary of State*,[17] this Court again addressed what it means to alter or abrogate an existing provision of the Constitution. In *Ferency*, we dealt with a challenge to the proposed "Tisch Amendment" that was intended to reduce property taxes, holding

> that it is only where the proposed amendment would directly "alter or abrogate" ("amend or replace") a specific provision or provisions of the existing Constitution that the provision or provisions must be noted on the petitions. An

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[12] Const 1908, art 17, § 3.

[13] *Pontiac*, 262 Mich at 341-342.

[14] *Id.* at 343.

[15] *Id.* at 344.

[16] *Id.* at 345.

[17] *Ferency*, 409 Mich 569.

> existing constitutional provision is altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative.[18]

This was a reasonable construction of those terms. In *Ferency*, we also cautioned that a more expansive definition of "alter or abrogate" would "chill" the ability of the people to amend their Constitution by potentially requiring the petition circulator to append the entire Constitution to ensure the validity of the petition to amend the Constitution.[19]

Finally, in *Massey v Secretary of State*,[20] this Court reaffirmed our holdings in *Ferency* and *Pontiac*. The Court clarified how to assess whether a proposed amendment would alter an existing provision, thereby requiring publication. We held that publication was required only when an amendment "would add to, delete from, or change *the existing wording*" of another constitutional provision and that the phrase "the existing wording" referred to the *actual text* of the provision.[21] In *Massey*, we concluded that the existing constitutional provision that set forth the qualifications for legislators was not altered by the addition of a new "term limits" constitutional provision, which established the additional qualification that a legislator not have served more than a specified number of prior terms in the Legislature, because the amendment did not change any words of any existing provision, nor did it cause an abrogation because the amendment rendered no provision wholly inoperative.[22]

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[18] *Id.* at 597.

[19] *Id.* at 597-598.

[20] *Massey v Secretary of State*, 457 Mich 410; 579 NW2d 862 (1998).

[21] *Id.* at 418 (citation and quotation marks omitted).

[22] *Id.*

We conclude that the constructions offered in *Massey*, *Ferency*, and *Pontiac* are sound and reaffirm those cases and that reasoning. Thus, an existing provision is only " 'altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative.' "[23] Furthermore, the phrase "the existing wording" refers to the actual text of an existing constitutional provision.[24]

Nonetheless, because the application of these terms continues to be a cause for debate, we take this opportunity to provide additional clarity. We must take care to enforce the constitutional and statutory petition safeguards that exist to ensure that voters are adequately informed as they exercise their right to amend the Constitution. In doing so, we have reasoned that "the ordinary elector, not being a constitutional lawyer, would be confused rather than helped by a publication of all the other constitutional provisions which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment."[25] We also must use caution not to usher in an interpretation by which we would "effectively require a petition circulator . . . to secure a judicial determination of which provisions of the existing Constitution the proposed amendment would 'alter or abrogate.' "[26] With these principles in focus, we turn to the specific terms "alter" and "abrogate."

A. "ALTER"

For the purposes of Const 1963, art 12, § 2 and MCL 168.482(3), a proposed amendment "alters" an existing

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[23] *Id.*, quoting *Ferency*, 409 Mich at 597.

[24] *Massey*, 457 Mich at 418.

[25] *Pontiac*, 262 Mich at 344.

[26] *Ferency*, 409 Mich at 598.

provision if the proposed amendment would " 'add to, delete from, or change the existing wording of the provision . . . .' "[27] The republication requirement applies only to alterations of the actual text of an existing provision.[28] If an amendment actually adds words to an existing provision, then republication is required. If an amendment actually deletes words from an existing provision, then republication is required. If an amendment actually changes the wording of an existing provision, then republication is required. But there is no such thing as a de facto or an indirect addition to, deletion from, or change in an existing provision. The fact that a proposed amendment might have a direct and obvious effect on the understanding of an existing provision is an insufficient basis from which to conclude that the proposed amendment alters an existing provision of the Constitution.

Under this standard, which is consistent with almost 80 years of jurisprudence in Michigan, offering an amendment as a new provision is dispositive on the issue of alteration. A new constitutional provision simply cannot alter an existing provision (though it may abrogate an existing provision) when the new provision leaves the text of all existing provisions completely intact.

B. "ABROGATE"

Because any amendment might have an effect on existing provisions, the "abrogation" standard makes clear that republication is only triggered by a change that would essentially eviscerate an existing provision. Our caselaw establishes that an existing provision of

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[27] *Massey*, 457 Mich at 418, quoting *Ferency*, 409 Mich at 597.

[28] *Massey*, 457 Mich at 418 ("The phrase 'the existing wording' should be taken literally.").

the Constitution is abrogated and, thus, must be republished if it is rendered "wholly inoperative."[29] An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity[30] or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together. That is, if two provisions are incompatible with each other, the new provision would abrogate the existing provision and, thus, the existing provision would have to be republished. An existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision, i.e., the two provisions are not incompatible.

Determining whether the existing and new provisions can be harmonized requires careful consideration of the actual language used in both the existing provision and the proposed amendment. An existing provision that uses nonexclusive or nonabsolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision. Rather, when the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs. On the other hand, a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement.

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[29] *Id*.

[30] See *id*.; *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 402; 686 NW2d 287 (2004).

Massey helps to illustrate this distinction. Article 4, § 7 of the 1963 Michigan Constitution contains a list of qualifications for members of the Legislature. Because that list did not purport to be exclusive, the term-limit amendment—which added an additional qualification to article 4, § 54 of the Michigan Constitution, limiting the length of time a legislator could serve—did not abrogate article 4, § 7 because the original qualifications remained fully in effect. However, had the existing list of qualifications purported to be the exclusive list of qualifications, then the new qualification contained in article 4, § 54 *would* have abrogated the existing provision because it would have been impossible to harmonize the additional qualification with an exclusive list of qualifications, i.e., the two provisions would have been incompatible. Thus, if the existing and new provisions can be harmonized, the amendment does not render the existing provision wholly inoperative.

This abrogation analysis requires consideration of not just the whole existing constitutional provision, but also the provision's discrete subparts, sentences, clauses, or even, potentially, single words. If the proposed amendment renders wholly inoperative any one of those discrete components, then the petition must republish the entire provision. For example, if a proposed constitutional amendment sought to reduce the age of eligibility to become a Michigan senator or representative, article 4, § 7, would have to be republished because the existing age-eligibility requirement, 21 years of age, is a discrete constitutional mandate even though it is included in a sentence that contains several additional eligibility requirements. In contrast, the term-limit amendment considered in *Massey* created no direct conflict with the specific eligibility requirements but merely added an additional one.

III. APPLICATION

A. COLLECTIVE-BARGAINING AMENDMENT—DOCKET NO. 145748

Citizens Protecting Michigan's Constitution (CPMC), which opposes the collective-bargaining initiative, alleges that the proposed amendment will alter or abrogate article 4, §§ 48 and 49 of the 1963 Michigan Constitution. The proposed amendment would neither alter nor abrogate either of those sections. First, the proposed amendment would leave the current text of both sections completely intact. Even if a proposed amendment's new provision specifically refers to or quotes an existing constitutional power and then proceeds to limit that power, as the proposed collective-bargaining amendment does with § 49, there would be no alteration of the existing provision because the text of the existing provision itself would remain unchanged. Thus, it would not alter the existing provisions.

Likewise, the proposed amendment would not abrogate either existing section in question because neither would be rendered a nullity. Section 49 provides that "[t]he legislature *may* enact laws relative to the hours and conditions of employment." Similarly, § 48 provides that "[t]he legislature *may* enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." CPMC alleges that these sections are abrogated by the Protect Our Jobs proposal, which declares that "[n]o existing or future law of the state or its political subdivisions shall abridge, impair or limit" the collective-bargaining rights secured by other portions of the proposed amendment. But CPMC misapprehends the meaning of abrogation in the context of the established petition law of this state. Under the existing constitutional language,

the legislative power is broad, but it is neither absolute nor exclusive. Neither section suggests that this power cannot be limited or affected by other provisions of the Constitution. Therefore, the Legislature may still enact the laws provided for in §§ 48 and 49, but should the amendment pass, the power to do so could be limited by collective-bargaining agreements. Because the Legislature retains the same nonexclusive grant of power, neither section would be rendered wholly inoperative.

B. BRIDGE AMENDMENT—DOCKET NO. 145755

Taxpayers Against Monopolies (TAM) opposes the amendment proposed by The People Should Decide (TPSD). TAM argues that the TPSD proposal would alter or abrogate three sections of the Constitution. Again, we respectfully disagree.

TAM argues that the new proposed constitutional provision would alter or abrogate article 2, § 9 of the 1963 Michigan Constitution, which provides the procedures for voting on an initiative or referendum, because it incorporates the procedures of article 2, § 9 by reference but then modifies those procedures when exercised with regard to votes on international bridge projects. The text of article 2, § 9 would remain untouched if the amendment passes, and thus no alteration would occur. Furthermore, the substance of article 2, § 9 would be completely unchanged by the proposal. It would be neither negated nor rendered inoperative, so no abrogation would occur.

TAM next argues that TPSD's amendment would alter or abrogate article 3, § 6 of the 1963 Michigan Constitution, governing the state's interest in internal improvements, because TPSD chose to situate its proposed amendment as article 3, § 6a. Importantly, TPSD has not proposed modifying § 6 itself. Instead, it has

proposed a wholly new section that, in TPSD's view, is best located in Michigan's constitutional scheme between § 6 and § 7 of article 3. Because it would be a new section of the Constitution, there would be no alteration of the text of any existing provision. The mere fact that the proponents of the amendment chose to situate a new section between two existing sections of the Constitution would not, by itself, alter the existing sections. Furthermore, there would be no abrogation because § 6 remains fully operative.

Lastly, TAM argues that the proposal would alter or abrogate article 7, § 16 of the 1963 Michigan Constitution, which provides the Legislature with the nonexclusive authority to provide for various infrastructure projects. Here again, there would be no alteration because the text of the existing provision would be unaffected by the proposed amendment. There would also be no abrogation. The relevant text of article 7, § 16 reads:

> The legislature *may* provide for the laying out, construction, improvement and maintenance of highways, bridges, culverts and airports by the state and by the counties and townships thereof; and *may* authorize counties to take charge and control of any highway within their limits for such purposes. The legislature *may* provide the powers and duties of counties in relation to highways, bridges, culverts and airports; *may* provide for county road commissioners to be appointed or elected, with powers and duties provided by law. [Emphasis added.]

Each grant of power in this section is open-ended; no specific or discreet grant is made. The Legislature may still provide for any project as before, though the scope of this nonexclusive power might be limited by the proposed amendment requiring a popular vote before construction of a bridge. So clearly the power would not be rendered wholly inoperative.

C. TWO-THIRDS VOTE TO RAISE TAXES AMENDMENT—
DOCKET NO. 145753

Defend Michigan Democracy (DMD) is challenging the amendment proposed by Michigan Alliance for Prosperity (MAP). DMD argues that MAP's proposal requiring a 2/3 vote in the Legislature to effectuate a tax increase would alter or abrogate several existing sections. Like TPSD, MAP styled its proposed amendment as a number and letter combination, specifically article 9, § 26a. Again, this would not be an alteration or abrogation of article 9, § 26 of the 1963 Michigan Constitution. Instead, it is a proposal that places the proposed amendment in a particular, chosen place in the Constitution, and in doing so takes advantage of terms and definitions that apply only to a certain range of sections. However, it would neither alter nor abrogate § 26. Therefore, the petition did not need to republish § 26.

Additionally, MAP was not required to republish article 9, § 3 of the 1963 Michigan Constitution, which calls for a 3/4 vote to increase ad valorem taxes for school operation. That section would not be altered because its text would suffer no deletion, addition, or change. Furthermore, § 3 would not be abrogated because it would remain fully operative. Article 9, § 3 established a *minimum* vote requirement for an increase in ad valorem taxes. That minimum would remain operative and could be harmonized with the new amendment, especially given that the proposed amendment expressly leaves existing, more burdensome hurdles in place. Any vote that satisfies the 3/4 requirement will necessarily satisfy the 2/3 requirement. Therefore, this section will not be abrogated if the amendment is adopted.

Similar logic applies to DMD's argument that MAP was required to republish article 9, § 6 of the 1963 Michigan Constitution. This section of the Constitution

states, in part, that property taxes may be increased "if approved by a majority of the electors, qualified under Section 6 of Article II of this constitution, voting on the question." This section applies to local millages, not state taxes, but even if it were to be affected by the proposed amendment, it did not need to be republished. The text would be untouched by the amendment so there would be no alteration. There would also be no abrogation because the procedures in § 6 do not purport to be exclusive. That the proposed amendment would require the vote by the electors to be in November would not abrogate § 6; it would merely add a more specific requirement to the existing procedure. Likewise, the addition of a second means to raise these taxes (by a 2/3 vote of the Legislature) is permissible without republication when the existing provision did not purport to be the exclusive procedure.

DMD's argument that the proposed amendment will alter or abrogate article 9, §§ 1 and 2 of the 1963 Michigan Constitution, is without merit. Section 1 empowers the Legislature to impose taxes, and § 2 states that the power shall not be "surrendered, suspended or contracted away." The text of both sections would remain unchanged and, therefore, unaltered. The proposed amendment would abrogate neither section because both sections would continue to empower the Legislature in the same manner as before the passage of the amendment. The Legislature's *power* would not be negated; the proposed amendment would simply require a larger majority to *exercise* that power. DMD further argues that these sections would be abrogated by allowing a majority of the electors to enact or raise taxes, which had previously been the exclusive province of the Legislature. But contrary to DMD's assertion, the Legislature has never held this power to the exclusion of the people. Indeed, article 2, § 9 of the 1963 Michigan Constitution has always reserved to

the people the power to enact any law the Legislature could enact, including a tax. Logically, when the people have already reserved to themselves the broad power to enact laws coextensive with the power of the Legislature, the assertion of that power cannot be deemed an abrogation.

D. CASINO AMENDMENT—DOCKET NO. 145754

Protect MI Constitution argues that the Citizens for More Michigan Jobs (CFMMJ) proposal will alter or abrogate article 4, § 40 of the 1963 Michigan Constitution. This section states in part:

> Except as prohibited by this section, (t)he legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise *complete* control of the alcoholic beverage traffic within this state, including the retail sales thereof. [Emphasis added.]

The proposed amendment would not alter § 40 because it would not add to, subtract from, or change the text of § 40.

However, the proposed amendment would abrogate § 40. The proposed amendment states in part:

> All of the casinos authorized by this section *shall* be granted liquor licenses issued by the state of Michigan to serve alcoholic beverages on the premises. [Emphasis added.]

It is undisputed that part of the Liquor Control Commission's "*complete* control of the alcoholic beverage traffic within this state, including the retail sales thereof" entails the granting of liquor licenses.[31] Furthermore, § 40 expressly states that the commission's control is "complete." Because complete control necessarily communicates the exclusivity of control, *any* infringement on that control abrogates that exclusivity; an amendment that

[31] Const 1963, art 4, § 40 (emphasis added).

contemplates anything less than complete control logically renders that power in § 40 inoperative. The proposed section would nullify the "complete" control currently established by the Constitution by taking specific decisions whether to grant or deny a liquor license to the newly established casinos out of the "control" of the commission.[32] Because the proposed amendment would abrogate article 4, § 40, republication of that section on the petition was necessary to comply with the republication requirement of MCL 168.482(3). The failure to do so is fatal to the proposed amendment, and we must therefore deny mandamus.

IV. CONCLUSION

In concluding, we reiterate our holdings so that the people will hereafter know with all the certainty and precision that is reasonably possible what is required to properly petition to amend the Constitution:

1. When the existing language of a constitutional provision would be altered or abrogated by the proposed amendment, republication of the existing provision is required.

2. The language of the amendment itself, rather than how proponents or opponents of the amendment characterize its meaning, controls whether an existing provision would be altered or abrogated by the proposed amendment.

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[32] Even though the amendment affects only a small fraction of the power to control alcoholic beverage traffic, which power itself is only a portion of Const 1963, art 4, § 40, a provision of § 40 has been negated and, thus, abrogated, thereby requiring republication of the entire constitutional section. At oral argument on this application, even CFM-MJ's counsel conceded that the proposed amendment would erode the exclusive and total control of the commission, thereby constituting an abrogation of § 40.

3. When the existing language of a constitutional provision would not be altered, but the proposed amendment would render the entire provision or some discrete component of the provision wholly inoperative, abrogation would occur and republication of the existing language is required.

4. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, and the new and existing provisions can be harmoniously construed, republication of the existing provision is not required.

5. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, thereby requiring that the new and existing provisions be interpreted together, republication of the existing provision is not required.

Accordingly, in *Protect Our Jobs* we affirm the judgment of the Court of Appeals granting relief on the complaint for mandamus. In *Michigan Alliance for Prosperity* and *The People Should Decide*, we grant relief on the complaints for mandamus in part, and direct the Board of State Canvassers, the Secretary of State, and the Director of Elections to proceed as necessary to place the proposed constitutional amendments on the November 2012 election ballot. We deny relief in all other respects. In *Citizens for More Michigan Jobs* we dismiss the complaint for mandamus filed in the Court of Appeals and deny relief in all other respects.

Pursuant to MCR 7.317(C)(3), we direct the Clerk of the Court to issue the judgment orders forthwith. No motion for rehearing will be entertained.

YOUNG, C.J., and MARKMAN and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

MARILYN KELLY, J. (*concurring in part and dissenting in part*). I concur with the result reached in *Protect Our Jobs v Board of State Canvassers* (Docket No. 145748), *Michigan Alliance for Prosperity v Board of State Canvassers* (Docket No. 145753), and *The People Should Decide v Board of State Canvassers* (Docket No. 145755). But I respectfully dissent from the result reached in *Citizens for More Michigan Jobs v Secretary of State* (Docket No. 145754).

The proposed constitutional amendment involved in *Citizens for More Michigan Jobs* neither alters nor abrogates article 4, § 40 of the state Constitution.[1] Because that section would not be altered or abrogated, there is no need for the petition to satisfy the republication requirement.[2] Accordingly, I would grant mandamus and direct the Board of State Canvassers, the Secretary of State, and the Director of Elections to take the steps necessary to place the proposed amendment on the November 2012 general election ballot.

The law governing this case is clear and was established long ago. If a proposed amendment would directly abrogate existing language in our Constitution, the existing language must appear on the petition. Thirty-two years ago, this Court held that a constitutional provision will be abrogated if a proposed amendment would render the provision "wholly inoperative."[3] For an existing provision to be wholly inoperative, the provision would have to be rendered a nullity[4] or it would have to be impossible to harmonize it with the proposed amendment.

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[1] Const 1963, art 4, § 40.

[2] See Const 1963, art 12, § 2.

[3] *Ferency v Secretary of State*, 409 Mich 569, 597; 297 NW2d 544 (1980).

[4] See *Massey v Secretary of State*, 457 Mich 410, 418; 579 NW2d 862 (1998); *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 402; 686 NW2d 287 (2004).

Article 4, § 40 of our Constitution states that the Legislature "may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof."[5] The majority reasons that the proposed constitutional amendment would abrogate the "complete control" language of this provision because it would grant liquor licenses to eight new casinos.[6] The majority posits that

> [b]ecause complete control necessarily communicates the exclusivity of control, *any* infringement on that control abrogates that exclusivity . . . . The proposed section would nullify the "complete" control currently established by the Constitution by taking specific decisions whether to grant or deny a liquor license to the newly established casinos out of the "control" of the commission.[7]

This reasoning is flawed. If § 40 is read in its entirety, it becomes apparent that the "complete control" of the Liquor Control Commission (LCC) is neither complete nor exclusive. Rather, it is subject to limits that the Legislature chooses to place on it.[8]

If the Legislature may subject the LCC's control to limitations, then so may the people of this state. The people have an inherent and superior right to amend the Constitution and to alter the authority of the

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[5] Const 1963, art 4, § 40.

[6] The proposed amendment states, in part, that "[a]ll of the casinos authorized by this section shall be granted liquor licenses issued by the state of Michigan to serve alcoholic beverages on the premises."

[7] *Ante* at 790-791.

[8] Const 1963, art 4, § 40; *Scott v Arcada Twp Bd*, 268 Mich 170, 173; 255 NW 752 (1934) (quotation marks omitted), overruled on other grounds by *Bundo v City of Walled Lake*, 395 Mich 679, 702-703 (1976) ("The control conferred upon the liquor control commission under the constitutional proviso is subject to statutory limitations.").

legislatively created LCC.[9] Should the voters pass the proposed constitutional amendment, it would be controlling by its nature, irrespective of whatever authority the Legislature has bestowed on the LCC. Moreover, because the LCC's "complete control" is subject to limitation both by statute and by the people, a constitutional amendment affecting that control cannot render the language of § 40 a nullity. Therefore, the proposed amendment cannot abrogate it.

Clearly, constitutional language limits the control of the LCC over alcoholic-beverage traffic in the state. Even if one were to pretend that it does not, the Court must give effect to the intent of the people in adopting constitutional provisions.[10] Therefore, should one conclude that the proposed amendment, if adopted, would collide with article 4, § 40, the Court is obliged to seek a construction that harmonizes the two. And in this case, harmonization is perfectly possible.

The proposed constitutional amendment would create eight new casinos. It is within the authority of the people to create the casinos and require the LCC to issue a liquor license to each of them. The authority of the LCC to decide whether to issue liquor licenses is qualified by statute and by the people. Hence, the existing constitutional provision and the proposed constitutional amendment may be read in harmony to give effect to the intent of the people if the people pass the amendment.

It should be noted, moreover, that the proposed constitutional amendment does not grant a perpetual

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[9] Citizens can petition for a constitutional amendment in accordance with the requirements of Const 1963, art 12, § 2.

[10] "It is a maxim that the object of construction [of constitutional language], is to ultimately ascertain and give effect to the intent of the people in adopting it." *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338, 346; 247 NW 474 (1933).

liquor license to each casino. It merely states that the casinos "shall be granted liquor licenses . . . ." The licenses would be subject to the liquor laws enforced by the LCC through the control that the Legislature has granted it.[11]

For all these reasons, I would allow the proposed amendment in *Citizens for More Michigan Jobs* to go to a vote of the people.

CAVANAGH and HATHAWAY, JJ., concurred with MARILYN KELLY, J.

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[11] See MCL 436.1103 *et seq*.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 18, 2012:

PEOPLE v VEILLEUX, No. 145142; Court of Appeals No. 302335. At oral argument, the parties shall address (1) whether sentences imposed after a finding of criminal contempt must be served consecutively under MCL 768.7a; and (2) whether a court may hold a person in contempt multiple times for each contemptuous act in a continuous course of conduct. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The motion to stay the execution of the defendant's contempt sentences pending appeal is granted. We further order the Oakland Circuit Court to determine whether any recording of the defendant's contemptuous behavior exists, and if so, to provide a copy of that record to this Court.

Reconsideration Denied July 18, 2012:

In re MORTIMORE ESTATE, No. 143307; Court of Appeals No. 297280. Leave to appeal denied at 491 Mich 925.

YOUNG, C.J., and MARKMAN, J., would for the reasons stated in the dissent to the order of May 25, 2012, 491 Mich 925, 925-931, grant reconsideration, vacate the order of May 25, 2012, and reinstate the appeal.

Reconsideration Denied July 20, 2012:

In re BRENT, No. 145036; Court of Appeals No. 298720. Leave to appeal denied at 491 Mich 938.

HATHAWAY, J., did not participate because of a familial relationship with the referee in this case.

Summary Disposition July 24, 2012:

PEOPLE v TED ANDERSON, No. 143339; reported below: 293 Mich App 33. By order of September 26, 2011, the application for leave to appeal the June 7, 2011, judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Kolanek* (Docket Nos. 142695, 142712) and *People v King* (Docket No. 142850). On order of the Court, the cases having been decided on May 31, 2012, 491 Mich 382 (2012), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of

Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Kolanek* and *King*.

We further order that the stay entered by this Court on August 23, 2011, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction.

PEOPLE v LONG, No. 144990; Court of Appeals No. 304963. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 24, 2012:

PEOPLE v OWENS, No. 142116; Court of Appeals No. 299818.

PEOPLE v WALBURG, No. 142875; Court of Appeals No. 295497.

PEOPLE v IDRIS YOUNG, No. 143429; Court of Appeals No. 296724.

PEOPLE v ARTHUR, No. 144035; Court of Appeals No. 302919.

PEOPLE v PATTERSON, No. 144088; Court of Appeals No. 303425.

PEOPLE v BEELBY, No. 144113; Court of Appeals No. 304014.

PEOPLE v LEONARD ROBINSON, No. 144158; Court of Appeals No. 304132.

PEOPLE v HALL, No. 144172; Court of Appeals No. 302915.

PEOPLE v KUKLA, No. 144181; Court of Appeals No. 303221.

PEOPLE v WALKER, No. 144182; Court of Appeals No. 300633.

PEOPLE v MITCHELL-EL, No. 144190; Court of Appeals No. 305176.

PEOPLE v JADE, No. 144196; Court of Appeals No. 301976.

PEOPLE v PERRY, No. 144199; Court of Appeals No. 304263.

PEOPLE v BURKOWSKI, No. 144214; Court of Appeals No. 304121.

PEOPLE v MILLER, No. 144225; Court of Appeals No. 306311.

PEOPLE v FARNAN, No. 144227; Court of Appeals No. 306121.

PEOPLE v MOSES, No. 144231; Court of Appeals No. 304077.

PEOPLE v GAVENDA, No. 144233; Court of Appeals No. 305585.

PEOPLE v ARRINGTON, No. 144234; Court of Appeals No. 305510.

PEOPLE v BRYAN BROWN, No. 144250; reported below: 294 Mich App 377.

PEOPLE v HARRIS, No. 144260; Court of Appeals No. 304230.

PEOPLE v HOLBROOK, No. 144292; Court of Appeals No. 298869.

PEOPLE v RILEY, No. 144300; Court of Appeals No. 302339.

PEOPLE v CALHOUN, No. 144305; Court of Appeals No. 303767.

PEOPLE v RIOS, No. 144320; Court of Appeals No. 304058.

PEOPLE v BOXX, No. 144345; Court of Appeals No. 305873.

PEOPLE v GILMORE, No. 144346; Court of Appeals No. 306437.

PEOPLE v ROCHELLE, No. 144365; Court of Appeals No. 306149.

PEOPLE v GREEN, No. 144366; Court of Appeals No. 304955.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the initial presiding trial court judge. See MCR 2.003(B).

PEOPLE v WEST, No. 144374; Court of Appeals No. 302131.

PEOPLE v HEISE, No. 144376; Court of Appeals No. 304628.

PEOPLE v LAMONT ROBINSON, No. 144377; Court of Appeals No. 305178.

PEOPLE v NOBLE, No. 144379; Court of Appeals No. 303132.

PEOPLE v DANNY THOMPSON, No. 144380; Court of Appeals No. 304656.

PEOPLE v BASON, No. 144382; Court of Appeals No. 304528.

PEOPLE v WAGONER, No. 144405; Court of Appeals No. 304183.

MARILYN KELLY, J., would grant leave to appeal.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v GOODMAN, No. 144409; Court of Appeals No. 305986.

PEOPLE v STEVEN THOMAS, No. 144424; Court of Appeals No. 306769.

PEOPLE v STARKS, No. 144433; Court of Appeals No. 304007.

PEOPLE v WALDON, No. 144436; Court of Appeals No. 302992.

PEOPLE v NEUMAN, No. 144444; Court of Appeals No. 306325.

PEOPLE v MARION, No. 144446; Court of Appeals No. 305064.

PEOPLE v MADDEN, No. 144447; Court of Appeals No. 305102.

PEOPLE v HURT, No. 144449; Court of Appeals No. 303626.

SCHIED v REDFORD CHARTER TOWNSHIP, No. 144456; Court of Appeals No. 306542.

PEOPLE v ROLON, No. 144458; Court of Appeals No. 306634.

PEOPLE v GRADY, No. 144461; Court of Appeals No. 306069.

PEOPLE v ALLMON, No. 144464; Court of Appeals No. 305346.

PEOPLE v SYKES, No. 144475; Court of Appeals No. 302114.

PEOPLE v KELLY, No. 144476; Court of Appeals No. 305206.

PEOPLE v SIMPSON, No. 144482; Court of Appeals No. 304511.

PEOPLE v BREWSTER, No. 144483; Court of Appeals No. 306735.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the initial presiding trial court judge. See MCR 2.003(B).

PEOPLE v FOWLKES, No. 144485; Court of Appeals No. 305205.

In re SIMS, No. 144576; Court of Appeals No. 304023.

PEOPLE v BOWDEN, No. 144598; Court of Appeals No. 299018.

PEOPLE v CAREY LYTLE, No. 144599; Court of Appeals No. 299367.

PEOPLE v FLOYD LYTLE, No. 144623; Court of Appeals No. 298789.

PEOPLE v MAST, No. 144644; Court of Appeals No. 307400.

PEOPLE v HOLLOWAY, No. 144668; Court of Appeals No. 306561.

In re KABANUK, No. 144673; reported below: 295 Mich App 252.

PEOPLE v GRESS, No. 144692; Court of Appeals No. 300528.

PEOPLE v CLAUDE WILLIAMS, No. 144700; Court of Appeals No. 307413.

PEOPLE v ECKFORD, No. 144729; Court of Appeals No. 307410.

PEOPLE v BROUSSARD, No. 144732; Court of Appeals No. 300007.

PEOPLE v JAMES, No. 144753; Court of Appeals No. 301526.

PEOPLE v MAGGART, No. 144755; Court of Appeals No. 300708.

PEOPLE v RICHARDSON, No. 144760; Court of Appeals No. 300475.

PEOPLE v HOLMES, No. 144770; Court of Appeals No. 299971.

PEOPLE v HUDGENS, No. 144774; Court of Appeals No. 300335.

PEOPLE v SHIVERS, No. 144784; Court of Appeals No. 307474.

PEOPLE v TALLEY, No. 144785; Court of Appeals No. 297581.

PEOPLE v RICE, No. 144788; Court of Appeals No. 307445.

PEOPLE v KIRBY, No. 144794; Court of Appeals No. 307075.

PEOPLE v KARON MORRIS, No. 144795; Court of Appeals No. 298146.

PEOPLE v ROSS, No. 144801; Court of Appeals No. 307246.

PEPPLER v PEPPLER AGENCY, INC, No. 144815; Court of Appeals No. 300194.

DANTZLER v ELLIOTT, No. 144828; Court of Appeals No. 301141.

PEOPLE v EDWARD ROBINSON, No. 144830; Court of Appeals No. 302274.

PEOPLE v ELISHA WILSON, No. 144834; Court of Appeals No. 302654.

PEOPLE v MERLINO, No. 144836; Court of Appeals No. 307760.

PEOPLE v GOREE, No. 144838; Court of Appeals No. 299867.

PEOPLE v WILKERSON, No. 144841; Court of Appeals No. 300052.

LAWRENCE v CITY OF TROY, No. 144845; Court of Appeals No. 300478.

PEOPLE v HALL, No. 144852; Court of Appeals No. 304769.

HARRIS v DETROIT PUBLIC SCHOOLS, No. 144856; Court of Appeals No. 304779.

PEOPLE v ABRAMS, No. 144861; Court of Appeals No. 300511.

PEOPLE v GUTIERREZ, No. 144862; Court of Appeals No. 300190.

PEOPLE v TROWBRIDGE, No. 144865; Court of Appeals No. 307268.

PEOPLE v BRANCH, No. 144866; Court of Appeals No. 299859.

PEOPLE v TORRES, No. 144876; Court of Appeals No. 298940.

PEOPLE v DAVID WASHINGTON, No. 144878; Court of Appeals No. 299875.

LIVINGSTON v HUNTINGTON MORTGAGE, No. 144881; Court of Appeals No. 302075.

PEOPLE v DARRYL JOHNSON, No. 144883; Court of Appeals No. 305388.

PEOPLE v FRED EVANS, No. 144887; Court of Appeals No. 299803.

MAZUR v DETROIT DEPARTMENT OF TRANSPORTATION, No. 144890; Court of Appeals No. 300519.

PEOPLE v COUSINS, No. 144892; Court of Appeals No. 300715.

PEOPLE v WESTBROOK, No. 144895; Court of Appeals No. 301928.

PEOPLE v SHEER, No. 144896; Court of Appeals No. 302109.

PEOPLE v CORONADO, No. 144899; Court of Appeals No. 302310.

PEOPLE v RAY, No. 144901; Court of Appeals No. 300363.

A & D DEVELOPMENT v MICHIGAN COMMERCIAL INSURANCE MUTUAL, No. 144903; Court of Appeals No. 301296.

PEOPLE v SCHNEIDER, No. 144904; Court of Appeals No. 300509.

ALLISON v HOOD, No. 144906; Court of Appeals No. 306340.

PEOPLE v HUNTER, No. 144907; Court of Appeals No. 300222.

PEOPLE v PROCHIE, No. 144911; Court of Appeals No. 299203.

PEOPLE v DALLAS LEWIS, No. 144912; Court of Appeals No. 307985.

PEOPLE v JEFFREY JONES, No. 144915; Court of Appeals No. 307322.

PEOPLE v JEFFREY JONES, No. 144917; Court of Appeals No. 307323.

PEOPLE v HOUTHOOFD, No. 144918; Court of Appeals No. 307411.

PEOPLE v MURRAINE, No. 144919; Court of Appeals No. 305304.

PEOPLE v KARON COLE, No. 144920; Court of Appeals No. 300695.

PEOPLE v RICKS, No. 144922; Court of Appeals No. 300927.

KOLE v NAGLE PAVING COMPANY, No. 144927; Court of Appeals No. 299352.

PEOPLE v ROZNER, No. 144928; Court of Appeals No. 307710.

PEOPLE v GERALD CLARK, No. 144931; Court of Appeals No. 308013.

PEOPLE v MAJOR, No. 144932; Court of Appeals No. 300238.

PEOPLE v WHITE, No. 144933; Court of Appeals No. 300692.

PEOPLE v DONTAYE JONES, No. 144934; Court of Appeals No. 301649.

PEOPLE v JOHNMESHA JONES, No. 144935; Court of Appeals No. 308554.

PEOPLE v DONTAYE JONES, No. 144936; Court of Appeals No. 301651.

PEOPLE v MICKEON WASHINGTON, No. 144938; Court of Appeals No. 302072.

PEOPLE v CHARLES BROWN, No. 144940; Court of Appeals No. 299459. CAVANAGH, J., would grant leave to appeal.

PEOPLE v JEFFREY INMAN, No. 144942; Court of Appeals No. 307978.

PEOPLE v SALYERS, No. 144945; Court of Appeals No. 301539.

PEOPLE v DENNIS WARD, No. 144949; Court of Appeals No. 299151.

PEOPLE v HACKNEY, No. 144950; Court of Appeals No. 307873.

PULICE v BOTSFORD GENERAL HOSPITAL, No. 144960; Court of Appeals No. 302092.

PEOPLE v BANKS, No. 144961; Court of Appeals No. 306929.

EDWARD C LEVY COMPANY v HAMMER TRUCKING, INC, No. 144962; Court of Appeals No. 298137.

PEOPLE v OLIVER, No. 144964; Court of Appeals No. 302421.

PEOPLE v DORIAN ROBINSON, No. 144968; Court of Appeals No. 301606.

PEOPLE v COLEMAN, No. 144973; Court of Appeals No. 307904.

PEOPLE v BLANCH, No. 144974; Court of Appeals No. 300508.

E T MACKENZIE CO v RBS CONSTRUCTION, INC, No. 144499; Court of Appeals No. 297406.

PEOPLE v CARTER, No. 145000; Court of Appeals No. 307355.

COMPUTER BUSINESS WORLD, LLC v SIMEN, No. 145001; Court of Appeals No. 301082.

IBRAHIM v CITY OF DETROIT, No. 145004; Court of Appeals No. 301617. MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v MCGOWAN, No. 145006; Court of Appeals No. 302502.

GE MONEY BANK v HADDAD, No. 145010; Court of Appeals No. 306506.

PEOPLE v STERHAN, No. 145011; Court of Appeals No. 305182.

GIBSON v FORD MOTOR COMPANY, No. 145012; Court of Appeals No. 305457.

PEOPLE v ABED, No. 145014; Court of Appeals No. 301459.

PEOPLE v MAYS, No. 145023; Court of Appeals No. 301365.

SCHIED v STATE COURT ADMINISTRATOR, No. 145027; Court of Appeals No. 306801.

ASHLEY v DEPARTMENT OF CORRECTIONS, No. 145029; Court of Appeals No. 306581.

PEOPLE v COOPER, No. 145033; Court of Appeals No. 298790.

PEOPLE v RICHARD, No. 145034; Court of Appeals No. 300469.

PEOPLE v PALMER, No. 145038; Court of Appeals No. 297641.

PEOPLE v O'NEIL, No. 145042; Court of Appeals No. 301700.

PEOPLE v JACKSON, No. 145043; Court of Appeals No. 308012.

SZYLO v AKOWITZ, Nos. 145044, 145054, and 145056; reported below: 296 Mich App 40.

UNITED OF OMAHA LIFE INSURANCE COMPANY v NEES, No. 145048; Court of Appeals No. 302639.

PEOPLE v DANIELS, No. 145050; Court of Appeals No. 308912.

PEOPLE v ESTACIO, No. 145051; Court of Appeals No. 307785.

SIEGRIST v INGHAM COUNTY SHERIFF, No. 145058; Court of Appeals No. 305709.

CITY OF EAST LANSING v RAPP REALTY, LLC, No. 145059; Court of Appeals No. 306281.

CITY OF EAST LANSING v ROMAN, No. 145076; Court of Appeals No. 306388.

KIEK INVESTMENTS, LLC v FRUITPORT CHARTER TOWNSHIP, No. 145078; Court of Appeals No. 302491.

PEOPLE v PATRICIA NELSON, No. 145096; Court of Appeals No. 308121.

FEDERAL HOME LOAN MORTGAGE CORPORATION v GOGOS, No. 145100; Court of Appeals No. 305375.

PFIZER, INC v DEPARTMENT OF TREASURY, No. 145102; Court of Appeals No. 301632.

PEOPLE v IDRIS ROBINSON, No. 145108; Court of Appeals No. 301605

POOLE v LAKESHORE ROOFING, LLC, No. 145132; Court of Appeals No. 307277.

PEOPLE v ROMO, No. 145172; Court of Appeals No. 308306.

TERAMO v CITY OF GRAND RAPIDS, No. 145189; Court of Appeals No. 304301.

PEOPLE v ARNOLD, No. 145199; Court of Appeals No. 308201.

Superintending Control Denied July 24, 2012:

BOGAN v ATTORNEY GRIEVANCE COMMISSION, No. 144976.

Reconsideration Denied July 24, 2012:

WOODS v DEPARTMENT OF CORRECTIONS, No. 143467; Court of Appeals No. 296609. Leave to appeal denied at 491 Mich 907.

AVERY v GRAND TRUNK WESTERN RAILROAD, INC, No. 143760; Court of Appeals No. 296582. Leave to appeal denied at 491 Mich 913.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v FIELDS, No. 143970; Court of Appeals No. 303330. Leave to appeal denied at 491 Mich 919.

YOUNG v INDEPENDENT BANK, No. 143975; Court of Appeals No. 299192. Leave to appeal denied at 491 Mich 908.

PEOPLE v STANLEY BROWN, No. 144298; Court of Appeals No. 292470. Summary disposition at 491 Mich 914.

WOLVERINE ENGINEERS AND SURVEYORS, INC v CITY OF LESLIE, No. 144335; Court of Appeals No. 299988. Leave to appeal denied at 491 Mich 910.

PEOPLE v TERRANCE WILLIAMS, No. 144501; Court of Appeals No. 286097. Leave to appeal denied at 491 Mich 921.

Application for Leave to Appeal Dismissed July 24, 2012:

PEOPLE v TAVERNIER, No. 144822; reported below: 295 Mich App 582.

Rehearing Denied July 26, 2012:

PEOPLE v LINCOLN WATKINS, No. 142031; Court of Appeals No. 291841. Reported at 491 Mich 450.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant rehearing.

MICHIGAN PROPERTIES, LLC v MERIDIAN TOWNSHIP, Nos. 143085, 143086, and 143087; Court of Appeals Nos. 289174, 289175, and 289176. Reported at 491 Mich 518.

Leave to Appeal as Cross-Appellant Denied July 31, 2012:

HOFFNER v LANCTOE, No. 142267; Court of Appeals No. 292275. Reported below: 290 Mich App 449. Opinion on the application for leave to appeal reported at 492 Mich 450.

Summary Disposition August 3, 2012:

MODIGELL v AUTO-OWNERS INSURANCE COMPANY, No. 145386; Court of Appeals No. 309777. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the Washtenaw Circuit Court's March 28, 2012, order denying the defendant's motion to exclude evidence and to strike claims. We remand this case to that court to conduct an evidentiary hearing to consider whether the plaintiff's proposed expert testimony meets the criteria of MRE 702. See *Craig v Oakwood Hosp*, 471 Mich 67 (2004), and *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004). We do not retain jurisdiction.

Leave to Appeal Denied August 3, 2012:

In re OLIVE/METTS MINORS, No. 145404; reported below: 297 Mich App 35.

GARCIA v ST JOSEPH MERCY HOSPITAL-OAKLAND, No. 145519; Court of Appeals No. 310708.

LAMAGNA v SAYEG PLASTIC SURGERY CENTER, No. 145538; Court of Appeals No. 310384.

Leave to Appeal Before Decision by the Court of Appeals Denied August 21, 2012:

PROTECT OUR JOBS v BOARD OF STATE CANVASSERS, No. 145684; Court of Appeals No. 311828. In lieu of granting leave to appeal, pursuant to MCR 7.302(H)(1), we direct the Court of Appeals to decide this case no later than Monday, August 27, 2012. The application for leave to appeal prior

to decision by the Court of Appeals is denied, because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals.

Leave to Appeal Denied August 22, 2012:

TRACY v TRACY, No. 145636; Court of Appeals No. 311072.

Leave to Appeal Denied August 24, 2012:

In re POPE, Nos. 145521 and 145522; Court of Appeals Nos. 306605 and 306610.

Summary Disposition August 24, 2012:

PROTECT MI CONSTITUTION v SECRETARY OF STATE, No. 145698; reported below: 297 Mich App 553. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and vacate that court's order of mandamus. The ballot proposal seeks voter approval of a constitutional amendment, and accordingly it is governed by Const 1963, art 12, § 2. There is no showing that there has been a failure to comply with this provision. The Court of Appeals erroneously applied Const 1963, art 4, § 25, which applies to amendments of laws. The plaintiff's complaint for mandamus is dismissed. The Secretary of State, the Board of State Canvassers, and the Director of Elections are directed to proceed.

MARKMAN, J. (*concurring*). It is seemingly the view of all the other justices of this Court that in amending the Constitution under Const 1963, art 12, § 2, compliance is neither required with the procedures of Const 1963, art 2, § 9, providing that no voter-initiated law "shall be amended or repealed, except by a vote of the electors" and that electors as a result must be apprised on the petition that a voter-initiated law has been placed in jeopardy, nor with Const 1963, art 4, § 25, providing that no law shall be "revised, altered or amended by reference to its title only" and that the sections revised, altered or amended "shall be reenacted and published at length." I do not consider either of these propositions to be indefensible, or even unreasonable, but I do respectfully disagree, for I view the Constitution to be sufficiently clear to the contrary.

In the instant case, the "initiated law" being "amended" or "altered" is the Gaming Control and Revenue Act (Gaming Act), MCL 432.201 *et seq*., adopted by the voters in 1996. As the Court of Appeals comprehensively points out, there are myriad provisions of that Act that would be rendered null and void by the contradictory language of intervening defendant's ballot proposal, including those pertaining to gaming tax rates, the allocation of gaming tax revenues, the authority of the Gaming Control Board, casino-municipality relationships, and investor disclosure requirements. Thus, I agree with the Court of Appeals that the ballot proposal "thoroughly revises the Act." Despite this, there is nothing in

defendant's petition that identifies it to voters as a proposal to amend the Gaming Act, for it is silent in that regard. The petition fails even to alert voters to the fact that they are being asked to amend a law that they themselves previously enacted through the initiative process, a requirement, in my view, that is provided for by both Const 1963, art 2, § 9 and Const 1963, art 4, § 25, the former requiring that a conflict with an existing voter-initiated law be identified and the latter requiring republication of the conflicted law.

In short, I agree with the Court of Appeals—and not just with the judges in the majority, but also with the dissenting judge, who recognizes that defendant's ballot proposal "does not, in fact, conform to the requirements of our Constitution for presentation to the voters"—that the pending ballot proposal is flawed. I am not persuaded by defendant's argument that because it "makes no changes in the Gaming Act itself" but only to the Constitution, its ballot proposal need not comply with the requirements of Const 1963, art 2, § 9 or Const 1963, art 4, § 25, despite the fact that, if adopted, the proposal would largely nullify the Gaming Act. It is too clever an argument that it is only the Constitution that is being "amended" or "altered," and not also the act. Rather, the effect, indeed the *intended* and not merely an incidental effect, of defendant's proposal is to "amend" and to "alter" the Gaming Act, and the harm feared by Justice COOLEY, *People v Mahaney*, 13 Mich 481 (1865)—that "the public, from the difficulty in making the necessary examination and comparison, fail[] to become apprised of the changes made in the law"—is exactly the harm that is posed in this particular case.

While I am appreciative that there is a strong democratic imperative grounded within our Constitution requiring that this Court respect and facilitate the initiative and referendum processes, there are also countervailing democratic imperatives that counsel caution and restraint. First, although Const 1963, art 12, § 2 provides that "[a]mendments may be proposed to [the] constitution by petition of the registered electors of this state," this same provision provides that "such petition shall be in the form, and shall be signed and circulated in such manner, *as prescribed by law*." (Emphasis added.) Thus, just as the people have enacted the former authority, so too have they enacted the latter constraint. Second, although Const 1963, art 2, § 9 sets forth the "power to propose laws . . . called the initiative," this same provision provides that, after adoption, these initiatives are accorded special protections against subsequent modification. Thus, just as the people are entitled to pursue initiatives such as the present one, the same people who adopted the Gaming Act initiative in 1996 are entitled to have *their* initiative upheld absent compliance with constitutional procedures. Third, although it is relevant only to referendums, the same constitutional provision that authorizes the referendum process, Const 1963, art 2, § 9, also specifies that such process "must be invoked in the manner prescribed by law," no doubt because it is an extraordinary process that replaces the ordinary democratic procedures of government, in which a majority of the people's representatives in the Legislature enact laws, with a procedure in which these laws can be enjoined by petitions signed by five percent of the people. Thus, again there are democratic imperatives in constitutional tension.

If there is virtue in today's decision, it is in providing clarity as to what the constitution requires of voter-initiated constitutional amendments. The people are entitled to know how this process is properly invoked. We have seen evidence over the past several weeks, and more such evidence appears imminent, of the confusion that exists in this respect on the part of the people, the Board of State Canvassers, the Secretary of State, and this Court itself. It is necessary for the integrity of the constitutional process, and for the integrity of this Court, that the rules be clarified. Although I read the Constitution differently from my colleagues, I welcome the clarity being introduced by today's decision. The process of amending the Constitution by initiative has been made simpler and more straightforward. Whether this is fully in accord with articles 2 and 4 of the Constitution is something about which reasonable minds can differ. I acquiesce and concur in the majority's decision and will adhere to it in all future cases of the same kind. It is a good thing that the law be settled in this matter.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered August 28, 2012:

PROTECT OUR JOBS v BOARD OF STATE CANVASSERS, No. 145748; Court of Appeals No. 311828. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we direct the clerk to schedule oral argument on August 30, 2012, at 2:00 p.m., on whether to grant the application or take other peremptory action. At oral argument the parties shall include among the issues addressed whether the republication requirement of Const 1963, art 12, § 2 and MCL 168.482(3), requiring that petitions set forth any other existing provisions of the Constitution that would be altered or abrogated by the proposed amendment, has been satisfied.

MICHIGAN ALLIANCE FOR PROSPERITY v BOARD OF STATE CANVASSERS, No. 145753; Court of Appeals No. 312083. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we direct the clerk to schedule oral argument on August 30, 2012, at 2:00 p.m., on whether to grant the application or take other peremptory action. At oral argument the parties shall include among the issues addressed whether the republication requirement of Const 1963, art 12, § 2 and MCL 168.482(3), requiring that petitions set forth any other existing provisions of the Constitution that would be altered or abrogated by the proposed amendment, has been satisfied.

CITIZENS FOR MORE MICHIGAN JOBS v SECRETARY OF STATE, No. 145754; Court of Appeals No. 312085. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we direct the clerk to schedule oral argument on August 30, 2012, at 2:00 p.m., on whether to grant the application or take other peremptory action. At oral argument the parties shall include among the issues addressed whether the republication requirement of Const 1963, art 12, § 2 and MCL 168.482(3), requiring that petitions set forth any other existing provisions of the Constitution that would be altered or abrogated by the proposed amendment, has been satisfied.

THE PEOPLE SHOULD DECIDE v BOARD OF STATE CANVASSERS, No. 145755; Court of Appeals No. 312088. Pursuant to MCR 7.302(H)(1), in lieu of

granting relief on the complaint, we direct the clerk to schedule oral argument on August 30, 2012, at 2:00 p.m., on whether to grant relief or take other peremptory action. At oral argument the parties shall include among the issues addressed whether the republication requirement of Const 1963, art 12, § 2 and MCL 168.482(3), requiring that petitions set forth any other existing provisions of the Constitution that would be altered or abrogated by the proposed amendment, has been satisfied.

Summary Disposition September 4, 2012:

J H CAMPBELL, INC v DEXTER TOWNSHIP, No. 142944; Court of Appeals No. 295455. By order of March 5, 2012, the application for leave to appeal the judgment of the Court of Appeals was held in abeyance pending the decision in *Toll Northville Ltd Partnership v Northville Twp* (Docket No. 143281). On order of the Court, the case having been decided on June 14, 2012, 491 Mich 518 (2012),* the application is again considered, and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgments of the Court of Appeals and the Michigan Tax Tribunal, and we remand this case to the Michigan Tax Tribunal for reconsideration of the petitioner's appeal, in light of *Toll Northville Ltd Partnership v Northville Twp*.

PEOPLE v JEROME WATKINS, No. 143572; Court of Appeals No. 301771. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, and consistent with our recent decision in *People v Kolanek* and *People v King*, 491 Mich 382 (2012), we reverse that part of the judgment of the Court of Appeals holding that a defendant who seeks to assert the affirmative defense under § 8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26428, must comply with the requirements of § 4 of the act, MCL 333.26424. We remand this case to the Oakland Circuit Court for an evidentiary hearing at which the defendant may raise the affirmative defense under § 8 of the MMMA. We do not retain jurisdiction.

PEOPLE v REDMOND, No. 144584; Court of Appeals No. 305318. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

In re PORTUS, No. 145099; Court of Appeals No. 309197. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied September 4, 2012:

PEOPLE v FATHI, No. 141633; Court of Appeals No. 288330. CAVANAGH, J., would grant leave to appeal.

PEOPLE v MYERS, No. 141770; Court of Appeals No. 291896. CAVANAGH, J., would grant leave to appeal.

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* Decided sub nom *Mich Props, LLC v Meridian Twp*, 491 Mich 518 (2012)—REPORTER.

PEOPLE v BILLY LONG, No. 141946; Court of Appeals No. 293586.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v PITTAO, No. 142052; Court of Appeals No. 290690.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v CHISLEY, No. 142312; Court of Appeals No. 292837.

PEOPLE v DAVID, No. 142372; Court of Appeals No. 291537.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v DIBBLE, No. 142406; Court of Appeals No. 292492.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v ALLEN, No. 142608; Court of Appeals No. 295159.

PEOPLE v YEAKEY, No. 142658; Court of Appeals No. 293912.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HANS SMITH, No. 142728; Court of Appeals No. 294921.

PEOPLE v DURR, No. 142897; Court of Appeals No. 301390.

PEOPLE v MICHAEL JOHNSON, No. 143019; Court of Appeals No. 295363.

PEOPLE v BAILEY, No. 143133; Court of Appeals No. 293730.

PEOPLE v KENNETH JOHNSON, No. 143367; Court of Appeals No. 296328.

PEOPLE v VRONKO, No. 143548; Court of Appeals No. 297792.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HAMMOND, No. 143602; Court of Appeals No. 296055.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v MIRACLE, No. 143660; Court of Appeals No. 297109.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v FERGUSON, No. 143809; Court of Appeals No. 302600.

PEOPLE v JOSHUN EDWARDS, No. 143976; Court of Appeals No. 291744.

PEOPLE v DARTANION EDWARDS, No. 144012; Court of Appeals No. 294871.

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CAVANAGH, J., would grant leave to appeal.

PEOPLE v CQUAN HINTON, No. 144083; Court of Appeals No. 291687.

PEOPLE v WYNN, No. 144119; Court of Appeals No. 297373.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v MELLOT, No. 144209; Court of Appeals No. 298748.

PEOPLE v REED, No. 144264; Court of Appeals No. 298427.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HUDSON, No. 144314; Court of Appeals No. 306500.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HIBBLER, No. 144318; Court of Appeals No. 302546.

PEOPLE v DILTS, Nos. 144331, 144332, and 144333; Court of Appeals Nos. 299684, 299716, and 299717.
CAVANAGH, J., would grant leave to appeal.

RAKOZY v ADVANCE PRINT & GRAPHICS, INC, No. 144395; Court of Appeals No. 300880.

PEOPLE v CHRISTIAN, No. 144408; Court of Appeals No. 291578.

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PEOPLE v OTIS COLE, No. 144519; Court of Appeals No. 305161.

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HATHAWAY, J., would grant leave to appeal.

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ZAHRA, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

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CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

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E T MACKENZIE COMPANY v SUTTON PLACE-RAISIN TWP, LLC, No. 144359; Court of Appeals No. 297864. Leave to appeal denied at 491 Mich 491.

PEOPLE v HAAK, No. 144494; Court of Appeals No. 300824. Leave to appeal denied at 491 Mich 920.

BROWN v BURK, No. 144498; Court of Appeals No. 298994. Leave to appeal denied at 491 Mich 919.

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PEOPLE v STACKHOUSE, No. 144778; Court of Appeals No. 301207. Leave to appeal denied at 491 Mich 945.

PEOPLE v CONERLY, No. 144800; Court of Appeals No. 301804. Leave to appeal denied at 491 Mich 945.

Summary Disposition September 7, 2012:

PEOPLE v CORTEZ DAVIS, No. 144384; Court of Appeals No. 304075. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for reconsideration of the defendant's successive motion for relief from judgment in light of *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), including the question whether *Miller* applies retroactively to cases that have become final on direct review. The motion to withdraw the application, the motion to concur with the request for leave, and the motion for stay are denied as moot. We do not retain jurisdiction.

Leave to Appeal Denied September 7, 2012:

In re MONTANEZ, Nos. 145675 and 145676; Court of Appeals Nos. 307908 and 307909.

In re ALEXANDER, No. 145678; Court of Appeals No. 306959.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 13, 2012:

PEOPLE v BYLSMA, No. 144120; reported below: 294 Mich App 219. We direct the clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address (1) whether the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., permits qualifying patients and registered primary caregivers to possess and cultivate marijuana in a collective or cooperative and (2) whether, under the circumstances of this case, the defendant was entitled to immunity from prosecution for manufacturing marijuana under § 4 of the MMMA, MCL 333.26424, or entitled to dismissal of the manufacturing charge under the affirmative defense in § 8 of the act, MCL 333.26428. The parties may file supplemental briefs within 14 days of the date of this order, but they should not submit mere restatements of their application papers.

The Attorney General, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

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1. Statutes that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application; to be uncon-

stitutional, the overbreadth must be substantial not only in an absolute sense, but also relative to the statute's plainly legitimate sweep; an ordinance that prohibits a person from disrupting the normal activity of any person, firm, or agency that is carrying out service, activity, or an agreement for or with the entity that enacted the ordinance criminalizes a substantial amount of constitutionally protected conduct and, thus, is facially overbroad and unconstitutional (US Const, Am I). *People v Rapp*, 492 Mich 67.

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1. Courts may only interfere with a public entity's exercise of discretion to accept or reject bids for public contracts when necessary to prevent fraud, injustice, or the violation of a trust. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 492 Mich 40.

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1. A prevailing party may tax the reasonable costs incurred in an appeal in the circuit court, including (1) the cost of an appeal or stay bond, (2) the transcript, (3) documents required for the record on appeal, (4) fees paid to the clerk or the trial court clerk incident to the appeal, (5) taxable costs allowed by law in appeals in the Supreme Court, and (6) other expenses taxable under applicable court rules or statutes, but costs are only taxable in civil, rather than criminal, matters (MCL 600.2441[2]; MCR 2.625, MCR 7.101[O]). *People v Rapp*, 492 Mich 67.

RECEIVERSHIPS

2. Upon application of the receiver, when there are insufficient funds to satisfy the receiver's costs and fees upon termination of a receivership, the circuit court may set the receiver's compensation and require the party requesting the receivership to bear the costs associated with the receivership (MCR 2.622[D]). *In re Receivership of 11910 South Francis Rd (Price v Kosmalski)*, 492 Mich 208.

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EVIDENCE

1. Newly discovered impeachment evidence may be grounds for a new trial if (1) the evidence itself and not merely its materiality was newly discovered, (2) it was not cumulative, (3) it could not have been discovered and produced at trial using reasonable diligence, (4) it makes a different result probable on retrial, and (5) there is a material, exculpatory connection between it and the witness's trial testimony; this connection may be of a general character and need not contradict specific testimony at trial. *People v Grissom*, 492 Mich 296.

FAILURE TO PAY CHILD SUPPORT

2. Inability to pay is not a defense to a charge under MCL 750.165, which imposes strict liability for failing to pay court-ordered child support; however, genuine impossibility is a defense under MCL 750.165 if supported by sufficient evidence; to establish impossibility, a defendant must show that he or she acted in good faith and made all reasonable efforts and used all resources at his or her disposal to comply with the support order, but could not do so through no fault of his or her own;

defendants must not only establish that they cannot pay, but that theirs are among the exceptional cases in which it was not reasonably possible to obtain the resources to pay; to determine whether a defendant has established impossibility, a court should consider whether the defendant has diligently sought employment; whether the defendant can secure additional employment, such as a second job; whether the defendant has investments that can be liquidated; whether the defendant has received substantial gifts or an inheritance; whether the defendant owns a home that can be refinanced; whether the defendant has assets that can be sold or used as loan collateral; whether the defendant prioritized the payment of child support over the purchase of nonessential, luxury, or otherwise extravagant items; and whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind; this list of factors for the court to consider is not, however, exhaustive. *People v Likine*, 492 Mich 367.

3. To be entitled to a jury instruction on the affirmative defense of impossibility to a charge of failing to pay child support under MCL 750.165, a defendant must present prima facie evidence from which the finder of fact could conclude that it was genuinely impossible for the defendant to have paid the support; a defendant who has made this threshold showing may be exonerated if the trier of fact finds that the defendant has established by a preponderance of the evidence that it was genuinely impossible for him or her to have complied with the family court order for each and every violation within the relevant charging period. *People v Likine*, 492 Mich 367.
4. To determine whether it was possible for a defendant to have complied with the support order giving rise to a felony charge under MCL 750.165 and evaluate the defendant's good-faith efforts, both the defense and the prosecution may rely on the record of the family court proceedings in addition to any other relevant evidence; evidence that the defendant was not truthful, hid assets, failed to accurately document the resources and assets at his or her disposal, was voluntarily unemployed or underemployed, failed to exhaust all reasonable and lawful means of generating the income necessary to

satisfy the support obligation, or failed to seek timely modification of the family court order when it became evident that it could not be performed may, singly or in combination, defeat a claim that it was impossible for the defendant to comply with the support order; the family court's determination of the amount a defendant is capable of paying does not preclude a defendant from asserting impossibility as a defense to felony nonsupport. *People v Likine*, 492 Mich 367.

GUILTY PLEAS

5. Under MCR 6.302(A), a defendant's guilty plea must be understanding, voluntary, and accurate; under MCR 6.302(B)(2), the trial court must advise the defendant before accepting the pleas of the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law; the habitual-offender statutes, MCL 769.10 *et seq.*, allow for a defendant's sentence to be enhanced on the basis of his or her prior felonies; when a defendant is subject to an enhanced sentence as an habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2), and a trial court must apprise the defendant of his or her maximum possible sentence as an habitual offender before accepting the guilty plea; the remedy for a violation of MCR 6.302(B)(2) is set forth in MCR 6.310(C), which provides that when there is a defect in the plea-taking process, the defendant may either allow the plea and sentence to stand or withdraw the plea, in which case the trial court must vacate the defendant's conviction and sentence; in the latter event, the matter may proceed to trial. *People v Brown*, 492 Mich 684.

DAMAGES—*See*

NEGLIGENCE 2

DEEDS—*See*

MORTGAGES 1

DEFENSES—*See*

CRIMINAL LAW 2, 3, 4

DISAPPOINTED BIDDERS—*See*

PARTIES 1

DISCRETIONARY DECISIONS ON PUBLIC CONTRACTS—*See*

CONTRACTS 1

SCHOOLS 1

DISRUPTING THE NORMAL ACTIVITY OF A PROTECTED PERSON—*See*

CONSTITUTIONAL LAW 1

DOCTRINE OF THE CHAIN OF PERMISSIVE USE—*See*

INSURANCE 7

DUTY—*See*

NEGLIGENCE 1

DUTY TO INVITEES—*See*

NEGLIGENCE 4

EFFECTIVELY UNAVOIDABLE DANGERS—*See*

NEGLIGENCE 3

ELECTIONS

CONSTITUTIONAL AMENDMENTS

1. Const 1963, art 12, § 2 and MCL 168.482(3) require that the petition for a proposed constitutional amendment republish any existing provisions of the Constitution that the proposed amendment would alter or abrogate; an amendment would alter an existing provision only when the amendment would actually add to, delete from, or change the existing wording of the provision, that is, the actual text of the provision, and an amendment would abrogate an existing provision only when it would render that provision wholly inoperative. *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763.
2. A proposed constitutional amendment would alter an existing constitutional provision and republication of that provision on the petition is required if the proposed amendment would actually (1) add words to, (2) delete words from, or (3) change the wording of the provision, but absent that, the fact that a proposed amendment might have a direct and obvious effect on the understanding of an existing provision is an insufficient basis

from which to conclude that the proposed amendment would alter the existing provision; offering an amendment as a new provision is dispositive on the issue of alteration because a new provision could not alter an existing provision (though it may abrogate an existing one) (Const 1963, art 12, § 2; MCL 168.482[3]). *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763.

3. A proposed constitutional amendment would abrogate an existing constitutional provision and republication of that provision on the petition for the proposed amendment is required if the proposed amendment would render an entire existing constitutional provision or some discrete component of it wholly inoperative, which would occur if the amendment would make the existing provision a nullity or it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together; an existing provision is not rendered wholly inoperative if it can be construed consistently with the new provision; determining whether abrogation will occur requires consideration of not just the whole constitutional provision, but also the provision's discrete subparts, sentences, clauses, or, potentially, single words; an existing provision that uses nonexclusive language or language that is not absolute would be less likely to be rendered inoperative simply because a proposed new provision will introduce in some manner a change to the existing provision; if the existing provision would likely continue to exist as it did before the amendment even though it might be affected or supplemented in some fashion, no abrogation would occur; a proposed amendment would more likely render an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to that provision would tend to negate the specifically conferred constitutional requirement (Const 1963, art 12, § 2; MCL 168.482[3]). *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763.

REFERENDUMS

4. The statutory provision requiring that a referendum petition heading be printed in 14-point type is mandatory; substantial compliance with the statutory requirement is insufficient; rather, the petition heading must

actually comply with the type-size requirement (MCL 168.482[2]). *Stand Up For Democracy v Secretary of State*, 492 Mich 588.

ELEMENTS OF INTERFERENCE WITH A BUSINESS EXPECTANCY—*See*

TORTS 1

EVIDENCE

See, also, CRIMINAL LAW 1

EXPERT TESTIMONY

1. Expert testimony regarding the phenomenon of false confessions and how a defendant's psychological makeup might have affected his or her statements pertains to a matter that is beyond the understanding of the average juror and might be relevant to the reliability and credibility of a confession. *People v Kowalski*, 492 Mich 106.

EVIDENCE OF CHARGES INCURRED FOR ALLOWABLE EXPENSES—*See*

INSURANCE 4

EVIDENCE OF IMPOSSIBILITY—*See*

CRIMINAL LAW 4

EXPECTATION OF PAYMENT BY CAREGIVERS—*See*

INSURANCE 4

EXPERT TESTIMONY—*See*

EVIDENCE 1

FACIAL UNCONSTITUTIONALITY —*See*

CONSTITUTIONAL LAW 1

FAILURE TO COMPLY WITH NOTICE REQUIREMENTS—*See*

ACTIONS 1

FAILURE TO PAY CHILD SUPPORT—*See*

CRIMINAL LAW 2, 3, 4

FALSE CONFESSIONS—*See*

EVIDENCE 1

FAMILY-JOYRIDING EXCEPTION—*See*

INSURANCE 6

FIRST AMENDMENT—*See*

CONSTITUTIONAL LAW 1

FIRST-PARTY ACTIONS—*See*

INSURANCE 1

FORECLOSURE BY ADVERTISEMENT—*See*

MORTGAGES 1, 2, 3

FRAUD RELATED TO PUBLIC CONTRACTS—*See*

CONTRACTS 1

FREE SPEECH—*See*

CONSTITUTIONAL LAW 1

GOVERNMENTAL CONTRACTS—*See*

CONTRACTS 1

PARTIES 1

SCHOOLS 1

GOVERNMENTAL IMMUNITY

COMMON CARRIERS

1. Under MCL 124.419, claims brought against a transportation authority in derogation of governmental immunity must be presented as an ordinary claim against the common carrier involved; written notice of a claim involving injury to persons o property must be served on the authority within 60 days of the occurrence through which the injury occurred; ordinary claims include traditional tort claims arising out of occurrences involving a common carrier through which injury is sustained, but a claim for no-fault benefits is not an ordinary claim for purposes of MCL 124.419 because it is not a tort claim, and notice of a plaintiff's application for first-party no-fault benefits does not constitute written notice of a third-party tort claim sufficient to comply with the statute; there is no aspect of substantial compliance to the statutory notice requirement. *Atkins v Suburban Mobility Auth for Regional Transportation*, 492 Mich 707.

GUILTY PLEAS—*See*

CRIMINAL LAW 5

HABITUAL-OFFENDER ENHANCEMENTS—*See*

CRIMINAL LAW 5

HAZARDS ON PROPERTY—*See*

NEGLIGENCE 3, 4

IMPEACHMENT EVIDENCE—*See*

CRIMINAL LAW 1

IMPOSSIBILITY AS DEFENSE TO FAILURE TO PAY CHILD SUPPORT—*See*

CRIMINAL LAW 2, 3, 4

INJUSTICE RELATED TO PUBLIC CONTRACTS—*See*

CONTRACTS 1

INSURANCE

NO-FAULT

1. Damages for replacement services that are in excess of the daily and three-year limitations contained in MCL 500.3107(1)(c) are not recoverable in a third-party tort action brought under MCL 500.3135(3)(c). *Johnson v Recca*, 492 Mich 169.
2. Under the no-fault automobile insurance act, a claimant seeking to recover personal protection insurance benefits for allowable expenses must prove four things: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable (MCL 500.3107[1][a]). *Douglas v Allstate Ins Co*, 492 Mich 241.
3. A no-fault insurer is liable under the personal protection insurance provisions of the no-fault automobile insurance act for allowable expenses consisting of all reasonable charges incurred for products, services, and accommodations reasonably necessary for an injured person's care, recovery, or rehabilitation; expenses for recovery or rehabilitation are costs expended in order to bring an insured to a condition of health or ability sufficient to

resume his or her preinjury life; expenses for care need not restore a person to his or her preinjury state, but must be related to the insured's injuries; allowable expenses cannot be for ordinary and necessary services (MCL 500.3107[1]). *Douglas v Allstate Ins Co*, 492 Mich 241.

4. Under the personal protection insurance provisions of the no-fault automobile insurance act, an insurer is liable for allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation, but the insurer is not obligated to pay any amount except upon submission of evidence that services were actually rendered and of the actual cost expended; the caregiver must have expected that he or she would be compensated in order for the charges to be considered incurred; the best way of proving that a caregiver expected compensation is for the caregiver to document the incurred charges contemporaneously with providing them—whether in a formal bill or in another memorialized statement that logs with specificity the nature and amount of services rendered—and submit that documentation to the insurer within a reasonable amount of time after the services were rendered; the evidentiary requirement applies equally when a family member provides care and when an unrelated medical professional provides care (MCL 500.3107[1][a]). *Douglas v Allstate Ins Co*, 492 Mich 241.
5. Under the no-fault automobile insurance act, a claimant seeking to recover personal protection insurance benefits for allowable expenses must prove that any charges incurred were reasonable; in determining what is a reasonable charge for a family member's provision of attendant-care services, the fact-finder may base the family member's hourly rate on the amount health-care agencies compensate their employees, but the amount health-care agencies charge their patients is not controlling; rather, the fact-finder must determine what is a reasonable charge for an individual's provision of services, not an agency's (MCL 500.3107[1][a]). *Douglas v Allstate Ins Co*, 492 Mich 241.
6. A person who takes a motor vehicle contrary to a provision of the Michigan Penal Code, MCL 750.1 *et seq*., has taken the vehicle unlawfully for purposes of MCL

500.3113(a) and is prohibited from receiving personal protection insurance benefits for accidental bodily injury arising from the vehicle's use regardless of whether the person is related to the vehicle's owner or whether the person intended to steal the vehicle. *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503.

7. A motor vehicle owner's consent to allow another person to use the vehicle does not give rise to a presumption that the owner has also consented to the use of the vehicle by a person whom the borrower authorized to use it for purposes of entitling that person to receive personal protection insurance benefits under MCL 500.3113(a). *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503.

INTENTIONAL TORTS—*See*

TORTS 1

INTERESTS CREATED AFTER THE EXECUTION OF A MORTGAGE—*See*

MORTGAGES 1

INTERESTS PREEXISTING THE EXECUTION OF A MORTGAGE—*See*

MORTGAGES 1, 2

INTERFERENCE WITH A BUSINESS EXPECTANCY—*See*

TORTS 1

INVITEES—*See*

NEGLIGENCE 4

JOINT AND SEVERAL LIABILITY—*See*

NEGLIGENCE 2

JOYRIDING—*See*

INSURANCE 6

JUDGES

MISCONDUCT

1. *In re James*, 492 Mich 553.

JURY INSTRUCTIONS—*See*

CRIMINAL LAW 3

LEGAL DUTY TO ACT—*See*

NEGLIGENCE 1

LIABILITY FOR RECEIVERSHIP COSTS—*See*

COSTS 2

LIENS—*See*

MORTGAGES 1, 2, 3

LOW BIDDERS ON PUBLIC CONTRACTS—*See*

PARTIES 1

SCHOOLS 1

MEDICAL MALPRACTICE—*See*

NEGLIGENCE 2

METROPOLITAN TRANSPORTATION AUTHORITIES ACT—*See*

GOVERNMENTAL IMMUNITY 1

MISCONDUCT—*See*

JUDGES 1

MORTGAGES

FORECLOSURE BY ADVERTISEMENT

1. MCL 600.3236 provides that the purchaser of a sheriff's deed following foreclosure by advertisement takes the same title that the mortgagor had at the time the mortgage was executed and that only prior subsisting liens affect the purchaser's interest; the statute requires that any interests in property created after the mortgage was executed will be extinguished upon expiration of the redemption period after a sheriff's sale, but any interests preexisting the mortgage's execution will not be affected by the sale and the grantee under a sheriff's deed will take the property subject to those preexisting interests. *In re Receivership of 11910 South Francis Rd (Price v Kosmalski)*, 492 Mich 208.
2. When a receiver's lien postdates a mortgage subject to foreclosure by advertisement, the receiver's lien must be

subordinated to the interests of the purchaser and any lienholders whose interests preexisted the execution of the mortgage; the common-law rule that a receiver's unpaid fees and compensation may be paid from the property or funds held in receivership before those funds are made available to prior creditors does not apply to statutory foreclosures by advertisement (MCL 600.3236). *In re Receivership of 11910 South Francis Rd (Price v Kosmalski)*, 492 Mich 208.

3. A mortgagee may waive its statutory right to first-priority satisfaction of its lien following statutory foreclosure by advertisement if the waiver is explicitly and unequivocally given, but a mortgagee's failure to object to the appointment of a receiver or acquiescence in the appointment generally does not constitute waiver (MCL 600.3236). *In re Receivership of 11910 South Francis Rd (Price v Kosmalski)*, 492 Mich 208.

MOTOR VEHICLES—*See*

INSURANCE 6, 7

NEGLIGENCE

DUTY

1. *Hill v Sears, Roebuck and Co*, 492 Mich 651.

MEDICAL MALPRACTICE

2. Under MCL 600.6304(6)(a), the defendants in a medical malpractice action are jointly and severally liable for the entire judgment as long as the plaintiff is comparatively without fault; under joint and several liability, when multiple tortfeasors cause a single, indivisible injury, the injured party may either sue all tortfeasors jointly or he or she may sue any individual tortfeasor severally, and each individual tortfeasor is liable for the entire judgment; if a jointly and severally liable tortfeasor settles before trial, the common-law setoff rule provides that the remaining tortfeasors may set off the amount of the settlement from any verdict rendered against them; the Legislature did not abolish the common-law setoff rule in the context of joint and several liability medical malpractice cases when it repealed the statutory setoff, former MCL 600.2925d(b), by 1995 PA 161, but the settlement must be set off from the final judgment after application of any statutorily required adjustments, including the noneconomic-

damages cap of MCL 600.1483(1) and the collateral-source rule of MCL 600.6303. *Velez v Tuma*, 492 Mich 1.

PREMISES LIABILITY

3. A premises possessor is generally not liable for open and obvious dangers, but liability may arise when special aspects of a condition make even an open and obvious risk unreasonable; under this limited exception, liability may arise when the danger is unreasonably dangerous or when the danger is effectively unavoidable; for an open and obvious danger to be effectively unavoidable, a person, for all practical purposes, must be required or compelled to confront the dangerous hazard. *Hoffner v Lanctoe*, 492 Mich 450.
4. Possessing a contractual right to use services or an invitee's subjective need or desire to use services does not heighten a landowner's duties to remove or warn of hazards and does not affect an invitee's choice about whether to confront an obvious hazard. *Hoffner v Lanctoe*, 492 Mich 450.

NEW TRIAL—*See*

CRIMINAL LAW 1

NEWLY DISCOVERED IMPEACHMENT EVIDENCE—*See*

CRIMINAL LAW 1

NO-FAULT—*See*

GOVERNMENTAL IMMUNITY 1

INSURANCE 1, 2, 3, 4, 5, 6, 7

NONECONOMIC DAMAGES—*See*

NEGLIGENCE 2

NOTICE OF INTENT TO FILE A CLAIM AGAINST THE STATE—*See*

ACTIONS 1

NOTICE OF TORT CLAIMS—*See*

GOVERNMENTAL IMMUNITY 1

OPEN AND OBVIOUS DANGERS—*See*

NEGLIGENCE 3, 4

ORDINANCES—*See*

CONSTITUTIONAL LAW 1

ORDINARY AND NECESSARY SERVICES—*See*

INSURANCE 3

ORDINARY CLAIMS AGAINST COMMON CARRIERS—*See*

GOVERNMENTAL IMMUNITY 1

OVERBREADTH CHALLENGES—*See*

CONSTITUTIONAL LAW 1

PARENT AND CHILD—*See*

CRIMINAL LAW 2, 3, 4

PARTIES

STANDING

1. A disappointed low bidder on a public contract has no standing to sue the public entity because its bid was rejected even when the public entity was required to let the contract to the lowest responsible bidder because such requirements are enacted for the protection of property holders and taxpayers, not for the benefit of bidders. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 492 Mich 40.

PERSONAL INJURY ACTIONS AGAINST THE STATE—*See*

ACTIONS 1

PERSONAL PROTECTION INSURANCE BENEFITS—*See*

INSURANCE 1, 2, 3, 4, 5, 6, 7

PETITIONS FOR CONSTITUTIONAL AMENDMENTS—*See*

ELECTIONS 1, 2, 3

PETITIONS FOR REFERENDUMS—*See*

ELECTIONS 4

PLEAS—*See*

CRIMINAL LAW 5

PREJUDICE BY LACK OF NOTICE—*See*
ACTIONS 1

PREMISES LIABILITY—*See*
NEGLIGENCE 3, 4

PRESUMPTION OF CONSENT TO USE A MOTOR VEHICLE—*See*
INSURANCE 7

PRIORITY OF LIENS—*See*
MORTGAGES 1, 2, 3

PROPERTY—*See*
MORTGAGES 1

PROPERTY DAMAGE ACTIONS AGAINST THE STATE—*See*
ACTIONS 1

PUBLIC CONTRACTS—*See*
CONTRACTS 1
PARTIES 1
SCHOOLS 1

REAL PROPERTY—*See*
MORTGAGES 1
NEGLIGENCE 3, 4

REASONABLE CHARGES FOR ATTENDANT CARE—*See*
INSURANCE 5

RECEIVER'S LIENS—*See*
MORTGAGES 2, 3

RECEIVERSHIPS—*See*
COSTS 2

REFERENDUMS—*See*
ELECTIONS 4

REJECTION OR ACCEPTANCE OF BIDS ON PUBLIC CONTRACTS—*See*

CONTRACTS 1

SCHOOLS 1

RELATIONSHIPS BETWEEN PARTIES GIVING RISE TO LEGAL DUTIES—*See*

NEGLIGENCE 1

REPLACEMENT SERVICES—*See*

INSURANCE 1

REPUBLICATION OF CONSTITUTIONAL PROVISIONS—*See*

ELECTIONS 1, 2, 3

RIGHT TO PRESENT A DEFENSE—*See*

EVIDENCE 1

SCHOOLS

CONSTRUCTION CONTRACTS

1. The low bidder on a school construction project does not have a valid business expectancy in the award of the contract; the award of governmental contracts is highly discretionary, and by statute a school board may reject any or all bids (MCL 380.1267[6]). *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 492 Mich 40.

SENTENCES—*See*

CRIMINAL LAW 5

SETOFFS—*See*

NEGLIGENCE 2

SHERIFF'S DEEDS—*See*

MORTGAGES 1

SIXTH AMENDMENT—*See*

EVIDENCE 1

SPECIAL ASPECTS OF OPEN AND OBVIOUS DANGERS—*See*

NEGLIGENCE 3

SPECIAL RELATIONSHIPS GIVING RISE TO LEGAL DUTIES—*See*

NEGLIGENCE 1

STANDING—*See*

PARTIES 1

STATE ENTITIES—*See*

ACTIONS 1

STRICT-LIABILITY CRIMES—*See*

CRIMINAL LAW 2, 3, 4

SUBSTANTIAL COMPLIANCE WITH TYPE-SIZE REQUIREMENTS FOR PETITIONS—*See*

ELECTIONS 4

THIRD-PARTY ACTIONS—*See*

INSURANCE 1

TORTS

See, also, GOVERNMENTAL IMMUNITY 1
NEGLIGENCE 2, 3, 4

INTERFERENCE WITH A BUSINESS EXPECTANCY

1. The elements of tortious interference with a business expectancy are (1) the existence of a valid business relationship or expectancy, (2) the defendant's knowledge of the relationship or expectancy, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the plaintiff; in order to establish a valid business expectancy, the expectancy must be a reasonable likelihood or probability, not mere wishful thinking. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, 492 Mich 40.

TRANSPORTATION AUTHORITIES—*See*

GOVERNMENTAL IMMUNITY 1

TYPE-SIZE REQUIREMENTS FOR PETITIONS—*See*

ELECTIONS 4

UNDERSTANDING PLEAS—*See*
CRIMINAL LAW 5

UNLAWFUL TAKING OF MOTOR VEHICLES—*See*
INSURANCE 6, 7

VALID BUSINESS EXPECTANCIES—*See*
SCHOOLS 1
TORTS 1

VIOLATION OF A TRUST RELATED TO PUBLIC CONTRACTS—*See*
CONTRACTS 1

VOLUNTARY PLEAS—*See*
CRIMINAL LAW 5

WAIVER OF LIEN PRIORITY—*See*
MORTGAGES 3

WITHDRAWAL OF PLEAS AFTER SENTENCING—*See*
CRIMINAL LAW 5

WITNESSES—*See*
CRIMINAL LAW 1
EVIDENCE 1